SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1029

JOHN J. DELURY, Individually and as President, JOHN J. CONROY, Individually and as Treasurer, etc. of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, etc.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT

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No.

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Appellants,

VS.

THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT

Appellants appeal from a final judgment of the New York State Court of Appeals made November 21, 1968 and entered in the Office of the Clerk of the New York Supreme Court, New York County on December 11, 1968 and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial Federal questions under the Constitution of the United States are presented.

Opinions Below

The opinion of the New York State Court of Appeals is reported in 23 N.Y. 2d 175 (Appendix A). The opinions of that Court in *Rankin* v. *Shanker* (3 of the 7 Judges dissenting) upon the basis of which, as stated by such Court,

one of the constitutional questions herein presented was decided, is reported in 23 N.Y. 2d 111 (Appendix B). The remittitur (Appendix C, p. 6a) and the decision of the New York Court of Appeals declining to amend its remittitur, upon the ground that the Opinion of such Court "clearly indicates that the constitutional arguments raised by appellants were passed upon" (Appendix C-1, p. 9a), are annexed.

The opinions of the New York Supreme Court, Special Term, Part I (the trial court) are unreported (Appendix D, pp. 10a-16a).

Jurisdiction

This proceeding to punish appellants for criminal contempt of court was instituted pursuant to the provisions of N.Y. Laws 1967, Chapter 392 (Civ. Serv. Law Art. 14), commonly known as the Taylor Law.

The judgment of the New York State Court of Appeals was made November 21, 1968 and entered on December 11, 1968, as above noted.

Notice of Appeal to this Court was served and filed in the Office of the Clerk of the New York Supreme Court, New York County on December 30, 1968.

The jurisdiction of the United States Supreme Court to review the judgment by direct appeal is provided for by Title 28, § 1257 (2) of the United States Code.

The following typical decisions of this Court sustain its jurisdiction to review this decision by direct appeal: *Duncan* v. *Louisiana,* 391 U.S. 145. Note also *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Bloom* v. *Illinois,* 391 U.S. 194.

New York Law Involved

New York Constitution, Article I, § 2 (Appendix E, p. 17a).

New York Civil Service Law, Article 14 (Appendix E, pp. 17a-22a).

New York Judiciary Law (Appendix E, pp. 22a-26a).

New York Labor Law (Appendix E, pp. 27a-29a).

Questions Presented

The questions presented by this appeal are:

1. Is it an unconstitutional denial of equal protection of the laws and due process for a State, which by statute accords to defendants generally the right of trial by jury in civil and criminal prosecutions for contempt arising out of the violation of a labor dispute injunction, to at the same time deny such right to trial by jury in a criminal prosecution for contempt arising out of the violation of a labor dispute injunction merely because the labor dispute involves public employees, particularly where the duties of such employees are identical to these commonly carried out by persons in private employment?

2. Where a State statute provides that no union or officer of a union shall be held responsible for the acts of its members in the course of a labor dispute except upon proof "without the aid of any presumptions of law or fact" of the doing of such acts and of its or his "actual participation in or actual authorization of such acts", is it a denial of due process and the equal protection of the law to refuse to accord the benefits of such statute to a union and a union officer merely because the union members engaged in such labor dispute are public employees and may the union and its officer be validly convicted of criminal contempt of a labor dispute injunction in the absence of such direct evidence or of any substantial evidence of such conduct by it or him?

3. Whether Article 14 of the New York Civil Service Law unconstitutionally deprived the appellants of liberty

and property without due process of law, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York against their will, without making any provision for payment of just compensation for such continued involuntary labor?

4. Whether the said statute unconstitutionally denied to the appellants the equal protection of the laws, by excluding them from the application of the State's labor relations laws, and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the Government, against their will?

5. Whether the injunction herein went beyond the prohibition of a strike by governmental workers, by prohibiting informational picketing and meetings by such workers?

Statement of the Case

These are the circumstances, as set forth in the printed Record on Appeal * to the New York Court of Appeals, out of which this appeal arises:

The members of appellant Union are employees of the Department of Sanitation of the City of New York. Their duties are the cleaning of streets and the removal of rubbish.

For some years the City and the Union have engaged in collective bargaining in regard to the wages and working conditions of such employees.

A collective bargaining agreement between the City and the Union expired on June 30, 1967 (31). Negotiations in

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* All references are to pages of that printed Record, except as herein noted.

regard to a new agreement, which had been commenced in April, 1967, continued sporadically through the year (167-169, 175, 177, 183).

On the evening of January 31, 1968, the City and the Union's officers reached a tentative accord in regard to a collective bargaining agreement (183-4, 205-6). The Union officers recommended its acceptance to a meeting of Union shop stewards (184-5, 205-6). Although the Union constitution provided that only the members may reject a proposed collective bargaining agreement and only then by a two-thirds vote on a secret ballot and that a strike cannot take place except upon a similar vote similarly conducted (42) the shop stewards' reaction to the proposed agreement was "explosive" (184). They shouted down the efforts of appellant DeLury to bring order to their meeting, ignored his statements calling to their attention the above-cited provisions of the Union's constitution (184-5), and "from that point on" they "[took] it on themselves", to reject the proposal and to demonstrate (185). Thereupon, and without waiting for action on the proposal by the membership as provided in the Union constitution, the City rejected the proposed agreement (184). From then on, it is clear that the Union and its officers had lost control of the situation.

On the morning of February 2nd a large number of employees of the Sanitation Department failed to appear for work (87-89) and demonstrated in front of City Hall (85-6). "At no time" did the Union or any of its officers suggest "strike action or slowdown" (95). A wild-cat work-stoppage was on, commencing in the early hours of February 2nd, and the City, ten hours later, obtained a temporary injunction against the wild-cat work-stoppage which was already in full effect (85, 87-8, 131-2).

Defendant DeLury and the other Union officers nevertheless kept up active negotiations with the mediators (186-187). As indeed they did continually from that point until

and even after Mr. DeLury was put in jail (189-190). Union representatives took over the task of attending negotiations and bargaining on a round-the-clock basis in an attempt to reach a settlement which would induce the men to return to work (190-200). Finally, the Governor took an active role in the negotiations and he and the Mayor jointly appointed a Board of Mediators (198).

A recommendation made by the Board of Mediators on February 9 was immediately accepted by the Union representatives (198), and thereafter was accepted at a special meeting of the membership of the Union (198-199).

The Mayor rejected the recommendations out of hand (198).

On February 10, 1968, in response to an appeal and an arrangement made by the Governor, the Sanitationmen returned to work (199-200).

The Labor Injunction

On the afternoon of February 2, 1968—some ten hours after the wild-cat work stoppage occurred—the City made application to the Justice presiding at Special Term, Part II of the Supreme Court, New York County, for an Order to Show Cause bringing on a motion for an injunction *pendente lite* restraining the Union, its named officers and fictitiously-named employees of the City of New York from engaging in a strike and strike action and directing them "to forthwith instruct all members" of the Union "not to engage or participate" in such strike. The City further requested that in such Order to Show Cause defendant be stayed from engaging in a strike or strike activity and the named defendant officers of the Union be "directed to instruct all members" of the Union "not to engage in any strike" (25-29). Such order was signed at 3:30 P.M. and served at 5 P.M. on the Union's attorneys (72, 85, 115, 141).

The motion for temporary injunction came on to be heard on February 5, 1968. Even though there was then outstanding an order restraining the defendants pending the hearing of that motion, the Court refused to grant even a one-day adjournment of that motion.

When an attempt was made to approach a discussion of the constitutionality of the Taylor Law the Court gave the subject short shrift, saying (76-77):

> "I will dispose of that constitutional question for you in one minute. The language is the same as it was in the Condon-Wadlin Act and that was held constitutional all the way up the line. So don't talk about the constitutionality.

Before the motion for temporary injunction was even argued, an Order to Show Cause bringing on a trial to punish defendants for criminal contempt of the preliminary restraining order was issued on the afternoon of February 5 and made returnable at 9:30 a.m. the following morning (80-83). Defendants promptly objected to "this unseemly haste" (80) and their counsel protested (81):

> "It is impossible for me to deal with a situation of this kind in such a short period of time."

The response of the Court was (82):

> "I will see you tomorrow morning."

The Criminal Contempt Trial

The trial of appellants for criminal contempt commenced on February 6, 1968 at 9:30 a.m. (83-4).

It was conducted before a Justice, without a jury.

The sole evidence offered against the Union officers was the following:

1. A statement purportedly made by the defendant DeLury *after* the walk-out had taken place (72, 85), and

before the first Order to Show Cause was signed (85), to an assemblage of persons in front of City Hall (Pl. Ex. 1, R. 228). That paper, entitled "Channel 2 News", apparently composed by an unidentified source, purports to set forth a statement of appellant DeLury made on the morning of February 2, 1968 outside City Hall:

> "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes (cheers). All opposed (boos). I didn't come here to bargain, I took a firm position with the City, I gave the members a final offer of this union. Now I want to show discipline here this morning—or this afternoon—I don't want to show where there is confusion in the members—you got a job at the locations to see that this is effective 100% (cheers)."

2. Testimony that almost all sanitationmen failed to appear for work on February 2nd, 3rd, 5th and 6th (87-88).

3. Testimony by a consultant to the Union in regard to labor negotiations between the City and the Union (90-92) and testimony by the same person that he had "no knowledge" (94) of whether defendant DeLury "gave instructions to the sanitationmen—with respect to engaging in a strike—after Mr. Justice Spiegel's order was served at 5:00 P.M. on February 2", and that "[a]t no time" (95) did Mr. DeLury or any other Union officer tell the City that there would be a strike" "unless a contract was entered into" (95).

4. Testimony of the Commissioner of Health and the Fire Commissioner to the effect that the accumulation of garbage constituted a health and fire hazard (101-104, 107-110).

5. Testimony of a police officer identifying records, assertedly kept in the course of business (Pl. Ex. 2), entitled "Sanitation Department Locations Being Picketed" (105), neither identifying the "pickets", nor show-

ing who they were, nor on whose behalf they were picketing, nor what they were picketing about nor how many there were.

6. A proposal by the City that it would (110)

> "Offer . . . testimony of *particular* sanitation men* as to whether or not *they* had received instructions from Mr. DeLury to report back to work."

and the statement by the attorney for Mr. DeLury,

> "that if *these* witnesses were called, they would testify that *they* did not receive any instructions from Mr DeLury to go back, because Mr. DeLury did not send them out, and Mr. DeLury did nothing to bring them back." (110)

On the basis of this sparse, inconclusive, and largely incompetent testimony the Court dismissed the application to regard to all of the named Union officers (14, 112), with the sole exception of appellant DeLury and, notwithstanding that the evidence in regard to Mr. DeLury was identical to that offered in regard to the other officers, the Court found him guilty of criminal contempt, sentenced him to 15 days in jail and fined him $250.

The City was ready with a pre-prepared Order and Mandate adjudging defendant DeLury guilty of criminal contempt (117). That proposed order as so submitted by the City contained a provision finding that the Union "by a vote of its members" resolved not to report for work "until a collective bargaining agreement had been ratified" (117-118). The evidence upon this score was so manifestly contrary to any such fact, that these words were stricken by the Court (118) and there was substituted therefor the provision "on February 2, 1968, there was a strike by said organization against the Department of Sanitation of the City of New York".

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* Ten in number (see 23 N.Y. 2d at p. 181, note 4, App. A).

The following day the trial was continued against the Union—again before a Justice and without a jury—to punish it for criminal contempt of Court for its asserted failure to obey the temporary restraining order contained in the order to show cause dated February 2, 1968 and the preliminary injunction dated February 5, 1968 (121).

Testimony was adduced to the effect that sanitation employees had not appeared for work on February 2 and 6 (131). Further testimony was adduced (134-135) as to the amount of Union membership dues checked off from Department of Sanitation employees' salaries by the City.

The only other evidence offered by the City was a tabulation (Pl. Exh. 3) dated February 7, 1968 entitled "Sanitation Department Locations Being Picketed." As in the case of the prior such tabulation (*supra*, pp. 8-9) there was no testimony as to what the pickets consisted of, who they were, how many pickets there were and, indeed, what they were picketing about (154).

In response to these objection (155) the Court overruling them and receiving the exhibit in evidence said:

> "If the question as whether the type of pickets they were, and who they were, were determinative of the issues in this case, there may be some weight to your contentions. *I will hold that they are not.*"

The only further evidence was testimony by Department of Sanitation employee that few employees reported for work on February 2 and a larger number reported for work on February 7 and 8, and that a few reported on February 9 and 10 (155-158).

The Court immediately found the Union guilty of criminal contempt, imposed upon it the maximum fine of $80,000 and the maximum forfeiture of its Union dues check-off rights for an eighteen month period (221-226; 17-25).

Presentation of the Federal Questions

The Federal constitutional questions were raised during the trial (76-77, 111, 112, 129), upon appeal to the Appellate Division of the New York Supreme Court, a court of intermediate appellate review, and in the New York Court of Appeals as reflected in the Opinion of the New York Court of Appeals and the memorandum of the concurring Judges (23 N.Y. 2d at pp. 179, 185, 187, 188; App. A) and the Order of that Court upon a motion to amend the remittitur (App. C-1, p. 9a).

The Federal Questions are Substantial

1. It is an unconstitutional denial of equal protection of the laws and due process for a State to accord the absolute right to jury trial for all defendants in criminal or civil contempt proceedings arising out of violations of labor dispute injunctions generally and at the same time deny such right to a jury trial in a criminal prosecution for contempt of a labor dispute injunction only where the labor dispute involves public employees.

A.

It would be difficult to conceive, of a more invidious and unreasoned discrimination denying equal protection of the laws than that here presented.

New York State has provided by two separate statutes that no defendant in a contempt proceeding arising out of a claimed disobedience of a "labor dispute" injunction can be convicted except after trial by jury, to which he is "entitled as a matter of right" (Judiciary Law § 753-a; and Labor Law § 808, App. E, pp. 25a-26a; 28a-29a).

And the New York Constitution (Art. I, § 2; App. E, p. 17a) forbids a waiver of trial by jury of a defendant in a criminal case, except by a written instrument executed in open court and approved by the Justice presiding.

Although neither statute expresses any exception to its provisions and the term "labor dispute" is broadly defined to embrace any controversy of any kind or nature arising out of a dispute between employer and employee relating to employment conditions, collective bargaining or the competing interests of employer and employee, the New York State Courts in this case have so construed those statutes as to exclude from their protection a single class of persons: public employees. Such persons (and their unions and union officers), even though, as in the instant case, they perform work identical to that performed by private employees and under conditions identical to those of private employers and even though the criminal contempt prosecution arose out of an asserted violation of labor dispute injunction, are deprived of the right to jury trial accorded to all others.

B.

It is manifest that what was involved here was a labor dispute, an anti-strike injunction and a prosecution for criminal contempt for the disobedience of that injunction.

Appellants are a union and an officer of a union whose members are employees of the New York City Department of Sanitation. Their tasks are the sweeping of streets and the collection of rubbish—functions typically, indeed generally—performed by private cartmen and their employees all over the country and, in point of fact, even in the City of New York. (See N.Y.C. Administrative Code §B32-267.0, *et seq.*)

It is for the alleged violation of a labor dispute injunction issued to enjoin the continuance of a work-stoppage by such employees that appellants were prosecuted and appellants DeLury and union were convicted, after trial by a

Court without jury, and were punished for criminal contempt. And it is from these convictions that appellants are appealing to this Court.

C.

Under New York law (N. Y. Constitution Art. I, § 2, App. E, p. 17a) when, in a criminal prosecution, a defendant is entitled to trial by jury, that right can be waived in one way only: "by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction". See also, *People* v. *Duchin,* 12 N.Y. 2d 351. It is unquestioned that there was no such waiver of the right to trial by jury here and the New York Court of Appeals, in addressing itself to appellants' argument that they were entitled to a jury trial in the absence of such a waiver, obviously concluded that the cited New York Constitutional provision applies here (23 N.Y. 2d at pp. 187-188; App. A).

In an appeal argued shortly after, but decided shortly before the instant case, the New York Court of Appeals (3 of the 7 Judges dissenting), held that neither Judiciary Law § 753(a) nor Labor Law § 808 applies to prosecutions for criminal contempt arising out of labor disputes involving public employees and that defendants in such prosecutions are not entitled to trial by jury (*Rankin* v. *Shanker,* 23 N.Y. 2d 111, App. B).

In the instant case the New York Court of Appeals reiterated and applied that ruling; the Judges who dissented in *Shanker* concurring in the instant case "on constraint" of that decision "insofar as the right to a jury trial is concerned" (23 N.Y. 2d at p. 188, App. A).

Upon this aspect of our appeal here we thus address ourselves to the error inherent in the majority opinion of the New York Court of Appeals in *Shanker,* as applied here.

We start with the basic premise, so often stated by this Court, that the Equal Protection clause of the 14th Amendment forbids invidious discrimination and commands that all persons be accorded equally the protection of equal laws.

"The purpose of the clause in respect of equal protection", this Court observed in *Frost* v. *Corporation Commissioners*, 278 U.S. 515, 522, "is to rest the rights of all persons upon the same law under similar circumstances."

And more recently (*Reynolds* v. *Simms*, 377 U.S. 553, 565):

> ". . . the concept of equal protection has been traditionally viewed as requiring uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

Particularly is this so in regard to prosecutions which are to end in the imposition of penal sanctions. For this Court, tracing the quest for equality before the law back to the pledge of Magna Charta, observed in *Griffin* v. *Illinois*, 351 U.S. 12, 17:

> "In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court' *Chambers* v. *Florida*, 309 U.S. 227, 241."

A recent application of the Equal Protection Clause by this Court is, we submit, controlling here.

In *Baxtrom* v. *Herold*, 383 U.S. 107, this Court held invalid as a denial of equal protection a pattern of statutes dealing with the commitment of dangerously mentally ill persons. Under those statutes, in the instance of persons

in such a category generally, a jury trial was provided by statute on the issue of their insanity and a judicial procedure was required for a determination of their dangerous character preliminarily to their being incarcerated in an institution under the jurisdiction of prison authorities. In the instance of persons who had become insane during imprisonment and had reached the end of their imposed prison sentence, no jury trial was provided for a determination of their mental illness and no judicial determination that such person was dangerous to the community was required before his incarceration in an institution under the jurisdiction of prison authorities.

This Court unanimously held that each aspect of the pattern of laws constituted an unconstitutional denial of equal protection of the laws, in an opinion by the Chief Justice, the terms of which are directly applicable here.

It would seem difficult, in the light of the foregoing, to justify the result from which we are appealing here.

The criminal contempt—which Justice White observed in *Bloom* v. *Illinois*, 391 U.S. 194, 201 is "a crime in every fundamental respect"—occurred here upon the claimed disobedience of the labor injunction order. The situation then became fixed and determined. As in the instance of any other crime, all that remained was for the defendants to be charged and tried. Their position under the law was precisely identical to that of the violator of any other labor injunction order. To paraphrase the Chief Justice in *Baxstrom, supra* (383 U.S. at p. 111) "For the purpose of granting judicial review before a jury on the question of" guilt, "there is no conceivable basis for distinguishing" between the violation of one labor injunction order and another, and it follows that "the State having made" a jury trial "generally available" in labor injunction contempt prosecution, it "may not consistent with the Equal Protection Clause of the Fourteenth Amendment arbitrarily withhold it from some."

D.

The New York Court of Appeals in the instant case rested the denial of the right to jury trial to appellants' Union and the president of the Union upon the single basis that the labor injunction for the violation of which they were prosecuted for criminal contempt arose out of a labor dispute between public employees and their employer, the City of New York. In *Shanker* (23 N.Y. 2d 111, App. B), the reasoning of which the New York Court of Appeals incorporated by reference in its opinion in the present case (23 N.Y. 2d 175, 178, 186, 187; App. A), that Court determined that New York Judiciary Law § 753(a) and New York Labor Law § 808 which expressly grant trial by jury "as a matter of right" in all prosecutions for contempt arising out of the disobedience of an injunction order granted "in any case involving or growing out of a labor dispute" is not applicable when the labor dispute is one between a public governmental agency and its employees. Having reached that conclusion, it recognized that under the Equal Protection Clause it was necessary for it to justify its exclusion of public employees and their unions and union officers from the benefits of a law providing trial by jury in a labor injunction case generally, upon the ground that such exclusion constituted an appropriate classification. The basis of the classification, absent from the terms of the statute but read into it by the majority of the New York Court of Appeals, was (23 N.Y. 2d at p. 117, App. B):

> "Prompt determinations, unencumbered by the long, drawn-out procedures involved in a jury trial are needed in criminal contempt proceedings in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the defendants."

Judges Keating, Bergan and Burke, in their dissenting opinions in *Shanker* demonstrate the error of the majority of the New York Court of Appeals.

Judge Burke, after first pointing out that the statutes "clearly intended that public employees and their representatives should have the right to trial by jury" in contempt proceedings arising out of labor disputes, continued (23 N.Y. 2d at p. 127; App. B):

> "But, an additional issue is raised by the contrary construction of those statutes. The issue is of a constitutional dimension since it involves a purported statutory discrimination between public and private employees in relation to their respective rights to such a jury trial. Initially, it should be emphasized that public employees, qua public employees, are not to be regarded as inhabitants of a constitutional limbo in which they are relegated to a 'watered-down version of constitutional rights.' (*Garrity* v. *New Jersey*, 385 U.S. 493, 500; *Keyishian* v. *Board of Regents*, 385 U.S. 589.) Furthermore, this proposition remains true even in the face of the dire perils of strikes by public employees. A teacher no more forfeits his constitutional rights when it is alleged that he is engaged in an illegal strike than does any individual citizen forfeit them when it is alleged that he has committed some heinous crime. We harbor no doubts as to the very serious character of the threat to the public inherent in strikes by public employees. It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge Cardozo: 'Historic liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feeling and distorts the judgment" * * * are not to change their form and content in response to the "hydraulic pressure" * * * exerted by great causes.' (*Matter of Doyle*, 257 N.Y. 244, 268, quoting Holmes, J. in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-401)."

Dealing with the Equal Protection Clause aspect, he pointed out the weakness of the majority opinion's classification argument, noting (23 N.Y. 2d at pp. 128-9; App. B):

> "Thus, a classification of unions and their members in terms of their employment in the public, as against the private, sector may well be reasonably related to a legislative objective of prohibiting strikes which interfere with essential public services. We are here faced, however, not with legislation barring strikes by public employees but with legislation which, *as construed*, denies a jury trial in a criminal contempt proceeding against public employees arising from the alleged violation of a court order issued in a labor dispute with a governmental employer, but which grants such a jury trial to employees in the private sector who are also charged with violating a court order. Each is charged with the same violation and the fact that one is employed by the Board of Education, while the other is employed by some private educational system or institution, has no bearing whatever on the procedural method by which his accountability for the alleged violation is to be determined. Is there any governmental interest which requires that the Board of Education employee have his guilt or innocence determined by a Judge without a jury, whereas the employee of the private educational system or institution may have his guilt or innocence determined by a jury? No such interest has been demonstrated in this case and characterizations of the jury-trial process as 'long' and 'drawn-out' cannot serve to supply such an interest."

Finally, dealing with the conclusion of the majority that the threat of "speedy punishment" by deprivation of a jury trial advances the cause of labor tranquility among public employees and, therefore, provides a proper basis for a classification depriving public employees alone of the benefits of a jury trial in a labor injunction case, Judge Burke pointed out that experience has shown that jailing union leaders has no such deterrent effect and on the contrary might tend to prolong a strike of public employees (23 N.Y. 2d at p. 129; App. B).*

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* Judge Keating, in his opinion 23 N.Y. 2d at p. 134 (n), (App. B) also noted that "the lack of a jury trial did not speed the end of the strike for in that case as well as others the strikes continued."

Judge Keating, in his dissenting opinion, pursued Judge Burke's observations and rested his conclusion "primarily on the constitutional question" of Equal Protection involved, and observed (23 N.Y. 2d at pp. 132-3; App. B):

> "The 'equal protection' clause stands as a guardian and protector of minorities of every kind against every form of irrational discrimination. It is manifestly far easier, politically, to pass legislation which touches adversely only a small group. The 'equal protection' clause seeks to control this tendency by requiring the Legislature to extend its classification to all persons or groups fairly within the legislative policy. Justice Jackson in his concurring opinion in *Railway Express* v. *New York,* (336 U.S. 106, 112-113) recognized this fundamental purpose of the 'equal protection' clause when he wrote: 'The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.'
>
> Later on in the opinion he summarized his views in a particularly apt phrase: '[W]e are much more likely to find arbitrariness in the regulation of the few than of the many' (336 U.S., p. 113)."

Judge Keating described the real question in the case upon this aspect in terms which compel the conclusion that a clear violation of Equal Protection resulted from the majority decision here. Thus (23 N.Y. 2d at p. 133; App. B):

> "The question is not whether public employees differ from private employees or whether the former

> may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U.S. 107, 111). More precisely, the issue here is whether the denial of a jury trial is necessary to the vital functioning of the Taylor Law. The 'one vital reason' offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for 'Prompt determinations' 'in criminal contempt proceedings under the Taylor Law' 'unencumbered by long, drawn-out procedures involved in jury trials' 'in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the defendants.' (Majority opn., p. 117.) In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]. While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.''

Rejecting the conclusion of the majority that this Court in the *United Mine Workers* case had ruled inapplicable to labor disputes involving public employees the jury-trial provisions of the Norris-La Guardia Act (29 U.S. Code §§ 101-113) from which the New York statutes here involved were derived, Judge Keating observed (23 N.Y. 2d at p. 133; App. B):

> ''In the case upon which the majority rely (*United States* v. *United Mine Workers*, 330 U.S. 258, 298), the 'equal protection' point was not even raised. Moreover, the case was decided in a day when the importance of the 'equal protection' clause, as a vital tool in the preservation of a just society, was only then beginning to be felt.''

In terms directly applicable here—the employees involved being removers of garbage, a task commonly, indeed, predominantly carried out by private employees—Judge Keating concluded (22 N.Y. 2d at p. 134, App. B):

> "When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is readily exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels 'public' and 'private' employees. In my view, the 'public'-'private' distinction cannot be maintained, as a constitutionally viable difference with respect to the right of a jury trial."

Little need be added to what is set forth in the dissenting opinions in *Shanker* except to note that this Court, particularly in recent years, has rejected attempts to relegate public employees "to a watered-down version of the Constitution", *Garrity* v. *New Jersey*, 385 U.S. 493, 500. It has repeatedly held that public employees "are entitled like all persons to the benefit of the Constitution". *Uniformed Sanitationmen's Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, denounced the notion that public employees, *qua* public employees have a lesser claim upon the protection of the Fourteenth Amendment than citizens generally, and struck down statutes which hampered or discouraged the assertion by them of constitutional privi-

leges. *Slochower* v. *Board of Education,* 350 U.S. 551; *Wieman* v. *Updegraff,* 344 U.S. 183; *Garrity* v. *New Jersey, supra; Uniformed Sanitationmen's Ass'n* v. *Commissioner of Sanitation, supra; Gardner* v. *Broderick,* 392 U.S. 273; *Spevak* v. *Klein,* 385 U.S. 511. Significantly, in those cases this Court had occasion to reject attempted justification of such discrimination upon the basis of "the States' interest in the loyalty of those in its service" (*Slochower* v. *Board of Education,* 350 U.S. at p. 555). If such an invidious classification cannot survive in the case of policemen and school teachers, it is hard to see how it can be applied to garbage removers.

Whether a person be employed by a municipal corporation or by a commercial corporation to dispose of rubbish would seem, on its face, a distinction without a difference in his right to equal treatment in prosecutions for crimes. His disputes with his employer have the same quality whether he works for one or the other. His union and its officers have the same purposes. But even more to the point of exact identity, is the standing, the character, the very nature of the position of his union and its officers when they are tried for criminal contempt arising out of the violation of a labor dispute injunction; whether the members of such union are public or private employees is then an irrelevancy. And if, as is the case here, the State accords to unions of private garbage collectors' employees the right to jury trials for both civil and criminal contempts of labor injunctions it must in all reason provide a similar right of trial by jury to the union and officer of a union of public garbage collectors for criminal contempt arising out of their labor disputes.

Any other conclusion does violence to "the central aim of our entire judicial system—all persons charged with crime must . . . stand on an equality before the bar of justice in every American Court" (*Griffin* v. *Illinois,* 351 U.S. 12, 17).

Finally, the suggestion of the majority of the Court of Appeals that public convenience justifies the discrimination against public employees inherent in the statutes as construed by the majority to exclude them from the right to trial by jury in labor injunction criminal contempt proceedings, is directly at variance with the principle, so often expressed by this Court, that convenience and expediency are no grounds for denial of Equal Protection.

For, as this Court said in *Reid* v. *Covert*, 354 U.S. 1, 14:

> "The concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the basis of our Government."

2. A trial for criminal contempt is in all respects a criminal prosecution to which all the exacting requirements designed to protect a defendant apply. Those requirements were ignored here.

Under New York statutory law neither a union nor a union officer can be held responsible for a crime, at law or in equity for unlawful acts in a labor dispute except upon proof "without the aid of any presumption of law or fact" of its or his performance of such acts and of its or his "actual participation in or actual authorization of such acts." Here there was completely absent any direct evidence of such conduct by either the appellant Union or by appellant DeLury and the refusal of the New York courts to apply that statutory measure of proof and their exception of labor disputes of public employees from its purview constitutes a denial of equal protection of the laws.

A.

Whatever doubt existed upon the question of whether a criminal contempt is a crime in the ordinary sense and whether a proceeding to punish for criminal contempt is in every respect a criminal prosecution, has now vanished

under the impact of this Court's recent decision in *Bloom* v. *Illinois,* 391 U.S. 194.

When the record here is examined in the light of that circumstance, it is manifest that the result achieved so far cannot stand. We note at the outset, that the defendants, although faced with a very serious criminal charge, were forced on trial upon less than twenty-four hours' notice, in plain violation of the Constitution (*Bloom* v. *Illinois, supra,* 391 U.S. at p. 205), over the vigorous protest of their counsel who pleaded that it was "impossible" for him to make adequate preparation "in such a short period of time" (see *supra,* p. 7), and were tried by a Justice who manifested from the outset a predisposition to find the defendants guilty and a clear intention to hurry the trial along to the result he had foreordained and apply the punishment he was intent upon inflicting (see, *e.g.* 21, 76-77, 79, 81, 149-152). But more significant, the resulting convictions were —and could only be—achieved by, in plain violation of the Equal Protection clause, denying to these defendants the benefits of a statute, applicable to defendants generally in prosecutions for violation of labor injunctions, requiring a special and exacting degree of proof of guilt, upon the sole apparent ground that the labor dispute here involved public employees.

Three signal facts must be noted here:

1. Neither appellant DeLury nor appellant Union nor any other officer of the Union called, counseled or instigated the work stoppage: on the contrary, appellant DeLury, the responsible officers of the Union and the Union itself all struggled and urgently counseled *against* strike or work stoppage action.

2. The work stoppage occurred and was fully in effect, as a spontaneous action of plaintiff's employees, *long before* any injunction or restraining order was issued.

3. With the sole exception of appellant DeLury, charges of criminal contempt, asserted against all officers of the union by the City, were dismissed by the Trial Justice, and no appeal has been taken by the City from such dismissal.

B.

We start with the proposition recently reiterated by the Supreme Court in *Bloom* v. *Illinois,* (391 U.S. at p. 205 that "it is certain that in proceedings for criminal contempt the defendant is presumed innocent, he must be proved guilty beyond a reasonable doubt".

Under New York statutory law the weight, the character and quality of evidence necessary to support a conviction in a trial arising out of a labor dispute are all specially prescribed. New York Labor Law, § 807[6] (App. E, p. 27a) provides:

> "No officer or member of any association or organization and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or *suit in equity* or in any *criminal prosecution,* for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence *and without the aid of any presumptions of law or fact,* of (a) the doing of such act by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization."

That statute was derived from a section of the Norris-LaGuardia Act (29 U.S.C. § 106), whose provisions have been liberally interpreted in favor of both unions and their officers (See *e.g., United Brotherhood of Carpenters* v.

United States, 330 U.S. 395; *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 735-42).* Yet, although it would seem on its face to be directly applicable here, the New York courts, in plain violation of the Equal Protection clause, failed and refused to apply it upon the apparent ground that it has no application to proceedings arising out of labor disputes involving public employees.

Subdivision 6 of Labor Law § 807, although part of a section whose other provisions relate to limitations upon the *issuance* of injunctions in labor disputes, is not limited to such matters, but on the contrary, as Justice Botein observed in *Lubliner* v. *Reinlib,* 184 N.Y. Misc. 472, 477 (1944)—the leading case upon this subject—"is not restricted to questions arising from the issuance of injunctions in labor disputes", but, like its Federal counterpart, which is a statute separate from and independent of the Federal anti-labor-injunction statute, states a separate, substantive rule applicable in all prosecutions and all proceedings at law and in equity.

As Justice Botein in the cited case observed (*id.* 481):

> "It will also be noted that subdivision 6 recurrently employs the words 'actual participation' * * * authorization 'or ratification' in conjunction with 'unlawful *acts*'. I interpret this association of words to mean that not only is *actual* authorization or ratification required, i.e., by means of some express action or declaration by the union, but also that the authorization, participation or ratification must be of the particular acts complained of and not of a general line or course of conduct. * * * It is evident that protection beyond that of the ordinary rules, governing vicarious agency liability is here required and contemplated. The seemingly studied reiteration of the words 'actual' and 'acts', as above quoted, and the

* Labor Law § 807[6] actually inposes a *greater* burden of proof than its Federal counterpart, since, unlike 29 U.S.C. § 106, it prohibits the use of "any presumptions of law or fact," in addition to requiring proof of "actual participation" or "actual ratification".

> *statutory prohibition against the plaintiffs* invoking *presumptions of law or fact,* set a substantive standard of proof which cannot be met even prima facie by allegations from which the most that can be gleaned is that a tortious act by an officer flowed from a general course of action authorized by the union."

That the subject matter of the claimed criminal contempt arose directly out of a labor dispute cannot be gainsaid, since it patently involves "terms and conditions of employment" and a "controversy arising out of the respective interests of employer and employee" and concerns "employment relations" (Labor Law § 807, subd. 10; App. E, pp. 27a-28a).

It is in this light that the record here must be examined and when so examined it is manifest that there was a complete failure of proof to sustain the convictions appealed from. For, in regard to both appellant DeLury and appellant Union, there is literally no evidence to support their convictions of criminal contempt of court. At most, there are fragments and bits of information which neither taken singly nor added together amount to a scintilla of evidence supporting the findings upon which the criminal contempt Orders and Mandates rest their validity.

Although this fragmentary material, if proved would fall far short of constituting sufficient evidence to sustain the convictions appealed from, we will address ourselves to it and show that even those fragments were not proved.

The sole ground upon which Mr. DeLury was convicted was (15) that he "wilfully disobeyed lawful mandates of this Court . . . *in that . . . he failed to instruct any member of* [*the Union*] *not to engage or participate in* a strike" (Order and Mandate, ¶ 6).

It must be remembered that at the same time and upon identical proof in this respect, every other officer of the Union was acquitted of the identical charge laid against them (14, 84, 112).

There is not an iota of evidence in the record that appellant DeLury had the slightest power to—or, as we shall show later, that he "failed to"—instruct any [sanitationmen] not to engage in or participate in any strike": the only evidence is directly to the contrary and demonstrates that he opposed the strike, counseled against the work stoppage and, for his pains, lost all power to "instruct" the men in regard to the work stoppage. Yet it is for having assertedly "failed to" so "instruct" them, alone, that Mr. DeLury was convicted and severely punished. This result was achieved despite the oft-repeated holding of our courts that a person "could not be punished for contempt for not doing what he did not have the power to do". *Greenberg* v. *Polansky*, 140 N.Y. App. Div. 326, 328 (1st Dept. 1910). To paraphrase Justice Stewart's observation in *International Longshoremen's Assn.* v. *Philadelphia Mar. Tr. A.*, 389 U.S. 64, 76: "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command beyond" a defendant's power of effective obedience.

Long before the injunction was even sought, let alone obtained, the sanitationmen had already engaged upon a work stoppage (*supra*, pp. 7-8, 9, 24). The record demonstrates that in point of fact Mr. DeLury (and the other officers of the Union) struggled and counseled against strike action and could not prevail against a spontaneous action by the sanitationmen (see pp. 5-6, *supra*). How, in such circumstances Mr. DeLury could be expected to effectively "instruct" the men to return to work, defies reason, and that he could be punished for failing to make an empty gesture by not *requesting* the men to return—a far different concept from instructing them—is difficult to comprehend and we submit, impossible to support.

C.

The sole and exclusive evidence offered to support this conclusion that Mr. DeLury "failed" to instruct *any* member [of the Union] not to engage in "strike action" is the following colloquy which took place in the course of the trial (110-111):

> "Mr. Nathan: If this Court please, I have advised Mr. O'Dwyer that the only additional proof which the City would offer would be the testimony of *particular sanitation men** as to whether or not they have received instructions from Mr. DeLury to report back to work.
>
> Mr. O'Dwyer: Your Honor, I think we could save a great deal of time with respect to that.
>
> It is our contention here that if these witnesses were called, they would testify that *they* did not receive any instructions from Mr. DeLury to go back, because Mr. DeLury did not send them out and Mr. DeLury did nothing to bring *them* back. These are the facts which are known to everybody . . . .
>
> The Court: *Well, there is nothing in these papers to indicate that he caused the strike.*"

In the first place, the proffered testimony was limited to "*particular* sanitation men". There is not the slightest evidence that appellant DeLury "failed to instruct *any* member" of the Union "not to engage or participate in a strike." Moreover, the only manner in which the conclusion reached in the Order and Mandate can be supported is by indulging in the inference that since appellant DeLury gave no such instructions to "*particular* sanitation men" he therefore gave no such instructions to "*any*" sanitation men. But such a conclusion falls far short of constituting "proof, . . . without the aid of any presumption of law or fact." as required by statute. Indeed, any such conclusion can be reached only by piling inferences upon presumptions. And entirely apart of the quoted provision of the Labor

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* Apparently, 10 were subpoenaed for this purpose (23 N.Y. 2d at p. 181 note 4; App. A).

Law, such evidence is far from amounting to proof of guilt "beyond a reasonable doubt" and cannot support a conviction of criminal contempt.

There is, in short, not a scrap of evidence in the record to support the conviction of appellant DeLury. As Justice Black, writing for the entire Court in *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 observed, "it is a violation of due process to convict and punish a man without evidence of his guilt."

D.

What we have said above in regard to appellant DeLury applies equally to appellant Union. For the evidence submitted to support the conviction of the Union for criminal contempt falls so far short of proof of guilt "beyond a reasonable doubt" as to constitute no evidence at all, and, in addition is drastically lacking in the qualities of the requisite proof dictated by the above-cited statute.

Again, it is of utmost significance that, as we have shown (*supra,* p. 9) every single officer of the Union who was charged with criminal contempt was acquitted, except DeLury.

The acts purported to constitute criminal contempt on the part of the Union are specified in the Order and Mandate in twenty-one separate items, only six of which directly charge activity to the Union itself (Items 10, 11, 12, 13, 14 and 21; R. 21-24). The other items relate to individual members of the Union (20-21), to a particular officer of the Union (20-21), or to formal matters charging no acts by the Union (20-21, 23-4).

Items 10 and 12 (21-2) "adjudges and decrees" that on eight days picketing activities "were conducted by the defendant Union". The sole claimed proof as to this item is so blatantly hearsay and so totally inconclusive as to lack the quality of even fragmentary evidence. It consists of a series of papers bearing date February 2, February 3,

February 4, February 5, February 6, February 7, February 8, February 9, and February 10, 1968 (Plaintiff's Exhibits 2 and 3), each entitled "Memorandum for the Police Commissioner" containing the legend "Sanitation Department Locations Being Picketed" and noting "Patrol borough commands report that . . . the following Sanitation Department locations are being picketed", and purported to list such locations. The theory upon which the Court accepted these "exhibits" was that they assertedly had been made in the regular course of business—a notion which constitutes at once an affront to the constitutional requirement that a defendant is entitled to confront accusers and violation of the hearsay rule (see, *e.g.*, *Yung Jin Teung* v. *Dulles*, 229 F. 2d 244, 2 Cir. 1956). But even if that were not so, those "exhibits" bear not a line or indeed a word to indicate who was doing the picketing, under what auspices the picketing took place or at whose direction the picketing occurred. For all that the record here shows, even if the exhibits were admissible, as clearly they are not, the picketing might have been conducted by persons totally unrelated to the Union or to its members and for purposes totally alien to those of the Union or of its members. The evidence, in short, completely fails to support the determination reached by the Court. Here again, it is only by piling inference upon presumptions of fact and imagining facts not in the record—in direct violation of Labor Law § 807 [6]—that the conclusion of the Court could possibly be justified. Clearly this proffered proof falls far short of any common law proof, let alone proof "beyond a reasonable doubt" or the kind of proof commanded by the statute above-cited.

Item 11 of the Order and Mandate (22) concludes that the "said picketing activities were conducted by the defendant Union" for the purpose of interfering with the performance of duty of City employees causing them to refuse to work and inducing them to strike. Here again there is not an iota of proof to support any such conclusion.

Item 13 (22-3) concludes that "defendant Union" disobeyed the restraining order and preliminary injunction in that "defendant Union failed to instruct any member of the Union not to engage or participate" in the strike action, and "failed to refrain from engaging in, causing, instigating, encouraging or condoning or lending support or assistance" to a concerted work stoppage. *There is literally no evidence at all to support this conclusion.* There is not a word of evidence that the Union instigated or encouraged or condoned or lent support or assistance of any nature to the strike action. The only evidence is precisely to the contrary: that is, to the effect that the Union and its officers actually and affirmatively counseled the men *not* to engage in strike action and urged them vigorously *against* the work stoppage upon which they spontaneously —and in violation of the Union Constitution—engaged upon. The only evidence even relating to that part of the conclusion charging the Union with failing to instruct "any member" of the Union not to engage in strike action, is a colloquy of counsel set forth above (p. 29) in regard to the appellant DeLury which, in the first place, is *limited* to the actions of the *appellant DeLury* and does *not* extend to the Union itself; and in the second place, related only to proposed and conceded testimony of "*particular* sanitation men". In short, there is not a scrap of evidence which by any straining of reasoning could support the conclusion, entirely apart from the fact that a finding of guilt can only ensue upon proof "beyond a reasonable doubt" and entirely apart from the quoted requirements of the Labor Law which impose upon the plaintiff the task of demonstrating participation and activity by the Union "without the aid of any presumptions" and proof of "actual participation", "actual authorization . . . or ratification" and "after actual knowledge" by the Union.

Upon this flimsy, totally unconvincing record, bereft of even a modicum of proof, let alone the requisite "proof beyond a reasonable doubt" required by law and totally

lacking the qualities dictated by the above-cited statute, appellant DeLury was jailed and fined and defendant Union suffered a fine of $80,000 and a cancellation of its check-off privileges designed to cripple it in its normal operations. Here again, apart from all else, we have a conviction "without evidence of guilt"; a plain "violation of due process". *Thompson* v. *City of Louisville, supra.*

E.

Manifestly, the convictions for criminal contempt here could not be sustained if there was applied to the record the exacting standards of direct proof "without the aid of any presumptions of law or fact" of "actual participation" and "actual authorization" by appellant Union officer and Union, commanded by New York Labor Law § 807 [6], (App. E, p. 27a). See *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 403. Although the opinion of the New York Court of Appeals does not explicitly so state, there is plainly implicit in both the opinion here and the majority opinion in *Shanker,* a determination that Labor Law § 807 [6], like Judiciary Law § 751-a and Labor Law § 808—all of which were urgently pressed in the New York courts by appellants—does not apply in trials for offenses arising out of labor disputes involving public employees.

What we have already said above (pp. 11-23) in regard to the exclusion of public employee unions and their officers from the jury trial provisions of Judiciary Law § 751-a and Labor Law § 808 applies *a fortiori* here. For, impossible as it is to justify that discrimination in regard to jury trials upon the ground of need for "speedy punishment", even that improper ground does not exist in regard to the quality and measure of proof required to achieve conviction, and invidious classification for such purposes which discriminates solely against public-employee unions and their officers in criminal contempt trials arising out of labor injunctions, verges on the irrational. *Baxtrom* v. *Herold,* 383 U.S. 107; *Rinaldi* v. *Yeager,* 384 U.S. 305.

3. Article 14 of the New York Civil Service Law unconstitutionally deprived the appellants of liberty and property without due process of law, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York against their will, without making any provision for payment of just compensation for such continued involuntary labor.

(a) A peaceful strike is not unlawful.

The only kinds of strikes by workers in private industry that have been declared unlawful by statute, or by judicial decisions, have been strikes for purposes that were not directly and immediately related to the wages and working conditions of the strikers, or in which the strikers conducted their strike by actions which were illegal at common law, or by actions which were prohibited by statute.

Thus a strike to collect disputed back wages (*Dorchy* v. *Kansas*, 272 U.S. 306); mass picketing and threats of violence during a strike (*Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740); a sit down strike (*Labor Board* v. *Fansteel Corp.*, 306 U.S. 240); a seamen's strike aboard ship away from home port (*Southern S.S. Co.*, v. *Labor Board*, 316 U.S. 31); a strike that breached a valid collective bargaining contract not to strike (*Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332): a secondary boycott (*Duplex Co.* v. *Deering*, 254 U.S. 443); causing frequent unannounced work stoppages (*Auto Workers* v. *Wisconsin Board*, 336 U.S. 245); and picketing to compel an employer to make a collective bargaining contract with a union, after the employees had voted not to be represented by such union (*Building Service Employees Union* v. *Gazzam*, 339 U.S. 532); have been deemed strikes for an illegal purpose, or by illegal means.

A peaceful strike for higher wages and improved working conditions has not been held unlawful in any case involving workers in private industry. Instead, the right of workers in private industry to strike for such purpose

has been recognized by statutes and by judicial decisions; 29 U.S.C. section 163; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 390; and injunctions against peaceful strikes for such purposes have been prohibited by the Clayton Act, and by the Norris-La Guardia Act, and by similar laws in the State of New York. 29 U.S.C. sections 52, 101; McKinney's New York Labor Law section 807.

Even where violence and other unlawful acts by strikers were enjoined, the injunction did not "restrain the defendants from abandoning whatever employment they were engaged in." *In Re Debs*, 158 U.S. 564, 598.

In 1947, Senator Taft stated his reasons for proposing no statutory limitations on freedom of workers in private industry to strike for improved wages and conditions of employment, as follows (93 Cong. Rec. 3835):

> " * * * we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. ***So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

(b) Peaceful strikes can be regulated by statutes providing for a temporary injunction, and a duty to continue collective bargaining, aided by mediation, to promote agreement between employers and workers, and thereby to reduce strikes.

The Taft-Hartley Act and the Railway Labor Act regulate but do not prohibit strikes by workers in private industry. They require labor unions and employers to give each other 60 days written notice preceding any proposed modification or termination of a collective bargaining con-

tract; to offer to meet and to negotiate thereon; to notify the appropriate governmental mediation services of existing disputes; and to continue to work without any strike or lockout during such sixty day period. 29 U.S.C. section 158; 45 U.S.C. sections 159-160.

Even where a threatened strike or lockout may create a national emergency, the statute only delays the strike for 80 days to afford time for investigation and mediation of the dispute; but if no settlement is reached during such 80 day cooling off period, the employees are free to strike. 29 U.S.C. sections 174-180; *Seafarers International Union* v. *United States,* 304 F. 2d 437, certiorari denied, 307 U.S. 924.

In *United Steelworkers* v. *United States,* 361 U.S. 39, 43, this Court sustained the constitutionality of the Taft-Hartley provision for an 80 day injunction against a strike which imperils the national health or safety (29 U.S.C. § 178). This Court said that the statute "does recognize certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety"; that it "makes the United States the guardian of these rights in litigation"; and that it provides "a public remedy in time of emergency *** in the common judicial form of an injunction."

The essential difference between an anti-strike injunction under the Taft-Hartley law, and under the Taylor law, is that the Taft-Hartley law commands the Court to discharge the anti-strike injunction after 80 days, (29 U.S.C. §180), whereas the Taylor law anti-strike injunction is permanent.

A Taft-Hartley injunction allows labor unions to negotiate with employers for a satisfactory collective bargaining agreement during the 80 days when the injunction bars them from striking, without destroying or reducing the union's bargaining power, because the employer knows that

the union will be free to begin or to resume a strike at the expiration of the 80 day injunction; and this factor coupled with the statutory duty to continue to bargain collectively, tends to promote labor peace and uninterrupted operations in inter-state commerce.

In contrast, a permanent anti-strike injunction under the Taylor law destroys the bargaining power of a union of governmental workers, and thereby renders it incapable of bargaining on equal terms with representatives of a governmental employer, who have no practical need or compulsion to agree on any collective bargaining terms with a union whose members can not lawfully withhold their labor by going on strike. Moreover, the public officials are subject to counter pressures by Chambers of Commerce and other groups representing the propertied classes in the community, for economy in government, at the expense of the workers. These factors militate against agreement on wages and conditions of employment, and they tend to promote strikes and stoppages of governmental operations.

(c) A peaceful strike against the government is not unlawful.

The Taylor law does not follow the policy of regulating temporarily, but not prohibiting permanently, strikes for improvement in wages and conditions of employment. Instead, it permanently prohibits strikes against the government of the State of New York, or its civil divisions or agencies, for any purpose, or by any means whatever.

The claimed justification for singling out governmental workers for application of a no strike law to them, but not to non-governmental workers, is that strikes which deprive the public of essential services coerce legislative appropriations to meet wage demands made by the strikers; that the strikers' wage demands may be disproportionate to their services and to the public funds available for allocation by annual expense budgets; and that thereby such strikes destroy democratic legislative processes.

But this fiscal and budgetary argument presents the very kind of economic considerations of financial ability to pay wages which are a proper subject of bargaining between employers and workers.

For many years statutes have fixed the wages of blue collar manual workers employed on governmental public works, at the prevailing rate of wages for work in the same trade or occupation (5 U.S.C. §5341; McKinney's New York Labor Law, §220).

These statutes recognize and apply the principle that the government should pay to its workers the fair market value of their labor, based on the wage rates paid by employers in private industry for comparable work. The City of New York is required by law to make provision in its annual expense budget for payment of prevailing rates of wages to manual workers on public works. McKinney's New York Labor Law, §220; New York City Charter §117 (10).

State and municipal legislative bodies which have power to raise money by taxation. can not be said to lack financial ability to pay a wage increase to governmental workers that would give them the fair market value of their labor, merely because no provision therefor was made in the expense budget for the current year, or for the ensuing year.

Economies in government operations should not be made at the expense of government employees by compelling them to contribute more than their own taxes to the cost of governmental operations, by prohibiting them from striking to obtain the fair economic value of their labor.

The record in this case shows that the Sanitationmen's strike did not coerce the City of New York to agree to their demands for a $600 annual wage increase (193).

Before the strike, the City had offered the Sanitationmen a $400 annual wage increase for a one year collective bargaining contract.

On the 8th day of the strike, the Sanitationmen accepted, but the City rejected a recommendation by mediators for a $425 wage increase for a one year collective bargaining contract (199).

On the 9th day of the strike, the Governor proposed that the State shall take over and operate the City's Sanitation Department.

On the 10th day of the strike, the City of New York and the men agreed to binding arbitration in order to avoid State operation of the City's Sanitation Department. The men returned to work that night (157; 208). The Arbitrator awarded a $425 wage increase for a 15 month collective bargaining period.

These facts show that the Sanitationmen's strike did not coerce the City of New York, or disrupt its expense budget in any way.

A strike of governmental workers can not be deemed to have coerced the government, if any practical alternatives are available to deal with the situation resulting from the strike.

Several alternatives were used by the City of New York during the Sanitationmen's strike.

One such alternative used by the City of New York, was to leave the strikers' work undone until the strike ended, by not collecting most of the residential garbage deposited in cans and containers alongside of apartment buildings and small houses. At the same time, the City arranged with the Sanitationmen's Union for union men to remove garbage from City hospitals and from other City institutions (108; 156).

After the strike ended, the Sanitationmen worked overtime for several days and removed all the garbage that had accumulated during the strike.

Another alternative used by the City, was to designate and establish sites on vacant lots throughout the City to which residents could bring their garbage for burning. This procedure was used increasingly by the City during the strike (107-110).

This Court has decided that a legislative finding that the public interest requires continued operation of industries at wage rates fixed by an industrial court, does not constitutionally justify a statutory command that owners and workers shall continue to serve in such industries; and that an obligation to continue in service "can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public equivalent to the appointment of officers and the enlistment of soldiers and sailors in the military service." *Wolff Packing Co., Industrial Court,* 262 U.S. 522, 541.

The striking Sanitationmen were not in the military service of the State of New York, or the City of New York.

Therefore, the Taylor Law could not constitutionally command them not to strike, nor to continue to work for the City of New York against their will, for less wages than they were willing to accept for their work.

In its brief below, the City of New York said (p. 42) that the Sanitationmen had a "constitutionally protected right to quit work"; but that they "cannot do so by concerted action without violating the statute."

But the Taylor law does not give individual governmental workers any right to quit work. It provides that "No public employee * * * shall engage in a strike * * *." Civil Service Law § 210, subd. 1.

This statutory prohibition applies to each individual public employee, and it prohibits him from quitting work.

Even if the Taylor law shall be construed as allowing individual governmental workers to quit work, its prohibition of strikes would nevertheless unconstitutionally deprive governmental workers of liberty and property with-

out due process of law, because quitting of work by individual governmental workers is not a practical alternative for individuals dependent on steady wages for their daily bread.

Like workers in private industry, governmental workers can effectively induce their governmental employer to make better terms with them only by uniting and quitting in a body. *Cf. American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209.

The New York Court of Appeals has said that "when men quit in concert, they offend against the law if their sole and unmixed motive or purpose is to injure an employer," *Reinforce, Inc.,* v. *Birney,* 308 N.Y. 164, 169; that "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another." *Beardsley* v. *Kilmer,* 236 N.Y. 80, 90; and that the acts complained of must be "without legal or social justification." *Campbell* v. *Gates,* 236 N.Y. 457, 460. See: *American Bank & Trust Co.,* v. *Federal Reserve Bank of Atlanta,* 256 U.S. 350, 358.

The Taylor law did not limit its prohibition of strikes to those in which the sole motive of the strikers was to injure the government.

The record shows that the Sanitationmen's sole motive in striking was to improve their wages and conditions of employment.

The Sanitationmen's actions during the strike in assigning several hundred of their members to remove accumulated garbage from City hospitals and institutions, without pay, shows that their strike was not activated by malicious desire to injure the City of New York (130-131).

It is clear, therefore, that the Sanitationmen's strike was not unlawful by the standards that the State of New York applies to the actions of workers who "quit in concert" in private industry. *Reinforce, Inc.,* v. *Birney, supra,*

308 N.Y. 164. See, also: *Hunt* v. *Crumbach*, 325 U.S. 821, 825.

The decision of the New York Court of Appeals sustained the constitutionality of the Taylor law's prohibition of strikes by public employees, without considering or deciding whether there was any motive or purpose to injure the governmental employer.

Instead, it decided that strikes by public employees can constitutionally be prohibited because they may "deprive the public of essential services," and thus "obtain gains wholly disproportionate to the services rendered by them," with consequent "destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives, but from the coercive effect of paralyzing strikes of public employees." 23 N.Y. 2d at p. 183.

Concerted actions by members of labor unions which have a reasonable connection to improvement of their wages or conditions of employment are not a civil wrong which can be enjoined, or for which civil damages can be recovered, even though such acts cause injury to employers in private industry. *Hunt* v. *Crumbach, supra,* 325 U.S. 821, 824; *Reinforce, Inc.* v. *Birney, supra,* 308 N.Y. 164.

Thus, injury to an employer standing alone, does not itself make unlawful a peaceful strike against an employer in private industry.

The New York Court of Appeals applied a different rule in sustaining the constitutionality of the Taylor law's prohibition of strikes by public employees solely on the ground that they may cause damage or injury to the State or its civil divisions.

But the State can not constitutionally prohibit strikes on the ground that the stoppage of work may cause damage to the public health, safety or convenience, or that it might

damage the interest of the government in continuing its operations without interruption by work stoppages.

In *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, it was decided that a statute pursuant to which the State seized a bus line, after its employees went on strike, did not make "a peaceful strike against a public utility unlawful," in direct conflict with Federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce.

Thus, State seizure and operation of a public utility whose uninterrupted operation is necessary for the public health, safety, or convenience, does not necessarily sustain the constitutionality of a statutory prohibition of a strike or work stoppage by employees of such State seized public utility.

The same result was reached in a case in which a governmental agency purchased a utility from a private owner and operated it as a public utility. *Local 266* v. *Salt River Project*, 78 Ariz. 30, 275 P. 2d 393, 400.

In an analogous case, this Court decided that the Federal Railway Labor Act applies to employees of the Belt Railroad, owned and operated by the State of California, even though California law gave them no legal right to strike, and the Federal Railway Labor Act was inconsistent with the civil service laws of California which regulated the employment relations of employees of the Belt Railroad, *California* v. *Taylor*, 353 U.S. 553, 566-567.

None of the cases cited in the decision of the New York Court of Appeals considered or decided the constitutionality of a statute which prohibited strikes against the Government, but made no provision for fixing just compensation for the involuntary labor which it commanded the workers to continue to perform for the Government, against their will.

The New York cases cited in the decision below considered only whether a statute can constitutionally termi-

nate the employment of persons who strike against the government, or impose some lesser employment discipline upon such persons (*Matter of DiMaggio* v. *Brown*, 19 N.Y. 2d 283; *Pruzan* v. *Board of Education*, 9 N.Y. 2d 911).

The Michigan case cited below (*Detroit* v. *Division 26 of Amalgamated Assn.*, 332 Mich. 237) decided only that employees who go on strike have no right to re-employment by the government. No question of punishment for criminal contempt for violating an anti-strike injunction was considered or decided in that case. Even so, Justices Black and Douglas dissented from this Court's dismissal of the appeal, and Justice Burton was of the opinion that probable jurisdiction should be noted. 344 U.S. 805.

The Cleveland case (41 Ohio App. 236), and the Norwalk Teachers' case (138 Conn. 269), considered only the need of the government for uninterrupted operations. Those cases did not consider or decide whether the government could constitutionally satisfy its own needs by prohibiting strikes by its employees, while doing nothing to satisfy the needs of its employees for just compensation for the labor that its statute commands them to continue to perform for the government against their will.

Auto Workers v. *Wisconsin Board*, 336 U.S. 245, sustained the constitutionality of a Wisconsin labor relations statute under which a Wisconsin Board ordered a union to cease interference with production, other than by a strike. The Court said that "nothing in the statute or the order makes it a crime to abandon work individually (compare *Pollock* v. *Williams*, 322 U.S. 4) or collectively."

In *United States* v. *United Mine Workers*, 330 U.S. 258, the dissenting opinion of Mr. Justice Rutledge said that "opposing claims concerning the right to strike and the power of the Government, as against this, to keep the nation's economy going * * * are indeed grave matters." 330 U.S. 385.

President John Adams said that the Constitution provides for a "government of laws and not of men." This

requires balancing the constitutional rights of individual citizens with the constitutional power of government to adopt measures it deems appropriate for its need for uninterrupted operations.

Such a balancing of individual rights with governmental needs requires the invalidation of the Taylor Law's anti-strike provisions, because it does not make any provision for fixation of just compensation for the involuntary labor which it commands public employees to continue to perform for the government, against their will.

(d) In any event, a statute cannot constitutionally prohibit a peaceful strike by governmental workers, unless it makes provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the government, against their will.

While legislatures have constitutional power "to mark the limits of tolerable industrial conflict in the public interest" (*Auto Workers* v. *Wisconsin Board, supra,* 336 U.S. 245, 249), they can not simply prohibit strikes by governmental workers, without making any provision for payment of just compensation for the involuntary labor which they command government workers to continue to perform for the government against their will.

In *Duplex Co.* v. *Deering, supra,* 254 U.S. 443, 488, the dissenting opinion of Mr. Justice Brandeis said that legislatures may limit labor disputes which endanger the community; and that such limitation may "substitute processes of justice for the more primitive method of trial by combat".

The Taylor law does not provide any process of justice for public employees, as a substitute for strikes by them, which it prohibits.

The due process clause of the 14th Amendment of the Federal Constitution requires the State of New York to give just consideration to the right of its governmental

workers to the fair economic value of their labor, instead of unilaterally fixing wages, and commanding the workers to continue to work at such wages, against their will.

When the government prohibits a strike and commands workers to continue to work, on the ground that their continued work is necessary in the public interest, then the workers have a constitutional right to judicial review of the unilateral fixation of their wages to determine whether the wages so fixed are so inadequate as to amount to deprivation of property without due process of law. *Wilson* v. *New,* 243 U.S. 332, 353.

Whenever the government unilaterally fixes wages or prices, and commands continued operation at the wages and prices so fixed, persons affected thereby have a constitutional right to judicial review of such wage and price fixations to determine whether they are so inadequate as to deprive them of the fair value of their labor, or of their property without due process of law. *Bowles* v. *Willingham,* 321 U.S. 503, 516-517; *Yakus* v. *United States,* 321 U.S. 414, 437; *Wilson* v. *New, supra,* 243 U.S. 332, 353.

The Taylor law does not provide any procedure for fixing just compensation for government workers whom it forbids to strike.

The absence of procedures for fixing just compensation for such continued involuntary labor of governmental workers unconstitutionally deprives them of liberty and property without due process of law.

The Taylor law does not provide collective bargaining as an alternative to strikes which it prohibits to governmental workers.

The Taylor law gives to "an employee organization" which represents a majority of public employees, a right "to represent the employees in negotiations and in the settlement of grievances" (Civil Service Law, § 208). But this right is incomplete and ineffective, because it imposes

no duty on the governmental employer to bargain collectively, in good faith, with the majority union of governmental employees, whereas comparable Federal and New York statutes do impose such a duty on private employers. 29 U.S.C. § 158(d); McKinney's New York Labor Law, § 704(b).

The mediation and fact finding procedures of the Taylor law are advisory, and not compulsory. McKinney's New York Civil Service Law, § 209. In this very case, Mayor Lindsay refused to accept the Mediators' recommendations, which the Sanitationmen accepted, on their Union's recommendation.

The report of Professor Taylor's committee stated that it was recommending "collective negotiations", instead of collective bargaining for governmental workers, because "It is the budget, rather than the market place, which constrains collective negotiation in public employment" (Taylor Report, pp. 12-13).

The Taylor Report stated that " 'collective negotiation' in the public services is unlike collective bargaining in the private enterprise sector. The strike cannot be a part of the negotiating process" (*id.*, p. 15).

This Court has said that "a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234.

Like workers in private industry, governmental workers have a vital economic interest in the fixation of their wages, on which they depend for their livelihood.

The cost of living in New York City rose more than 5% in 1968, according to the Federal Bureau of Labor Statistics. This means that the purchasing power of money wages declined by the same percentage, thereby actually

reducing real wages, in terms of ability to buy things with the wages paid to governmental workers for their work. Governmental workers are victims rather than a cause of the rapidly increasing price inflation of recent years. They can not continue to work without frequent increases in their money wages, which do not even bring them up to the intervening increases in the cost of living.

By prohibiting them from striking, and by commanding them to continue to work for the government for wages that the government unilaterally fixes, the Taylor law gives them no alternative whereby they can "escape the obligation to go on" working for less than the fair value of their labor. *Pollock* v. *Williams,* 322 U.S. 4, 18.

4. The Taylor law denied to petitioners the equal protection of the laws by excluding them from the application of the State Labor Relations Laws and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the government, against their will.

Governmental workers have the same constitutional right as other citizens to due process of law, under the Fourteenth Amendment, and to freedom of association, under the First Amendment of the Constitution of the United States. *Uniformed Sanitationmen's Association* v. *City of New York,* 392 U.S. 280. *Cf. Gardner* v. *Broderick,* 392 U.S. 273; *Garrity* v. *New Jersey,* 385 U.S. 493.

Assuming that the State of New York, as a sovereign government, has a need for uninterrupted governmental operations which can be met by a law that prohibits its employees from striking, we submit that, for the reasons previously stated, pp. 45-47, *supra,* such statutory prohibition can constitutionally be enforced only where the State provides by law an alternative procedure for fixation of fair wages for the involuntary labor that it commands its workers to continue to perform involuntarily for the government.

5. In any event, the injunction herein unconstitutionally went beyond the prohibition of a strike by Sanitation workers, by prohibiting informational picketing and meetings by such workers.

Even if the Taylor law constitutionally prohibited the Sanitationmen from striking, the injunction in this case went beyond the prohibition of a strike by Sanitationmen by prohibiting informational picketing in front of or in the vicinity of any City premises, "or calling meetings and causing crowds to collect in front of said structures" (R. 10).

Informational picketing, and holding meetings are activities that Sanitationmen and their Union had a constitutional right to use to voice and to publicize their demands for improvement in their wages and conditions of employment.

In *Re Berry,* 65 Cal. Rptr. 273, 436 P. 2d 273, the Supreme Court of California struck out prohibitions against informational picketing and meetings, from an injunction prohibiting a strike by social workers employed by the County of Sacramento.

Citing *Thornhill* v. *Alabama,* 310 U.S. 88, and *N.A.A.C.P.* v. *Button,* 371 U.S. 415, the California Supreme Court said that "the County has fallen far short of demonstrating a compelling public interest sufficient to justify limitation of *informational* picketing and demonstration per se in the locations where the order forbids such activities". (436 P. 2d at 284, emphasis by the Court.)

Conclusion

Substantial and highly significant questions of constitutional law are presented by this appeal; questions, which have never before been considered by this Court, upon the answer to which depend the constitutional rights of a multitude of public employees and the unions which they have formed to advance their rights as workers.

The convictions from which we are appealing substantially diminish the constitutional rights of civil servants, render them "non-persons" (Fortas, *Equal Rights—For Whom?*, 42 N.Y.U.L. Rev. 401, 404-5) and cast them into "a constitutional limbo in which they are relegated to a watered-down version of constitutional rights" (*Rankin* v. *Shanker*, 23 N.Y. 2d 111, 127, diss. op.; App. A).

It is to right this wrong that we are appealing and it is urged that this Court should hear and determine the grave questions here involved.

February, 1969

Respectfully submitted,

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Appendix A

(Opinion of New York Court of Appeals and Concurring Memorandum (23 N.Y. 2d 175))

(PHOTOSTATS)

(See opposite ☛)

APPENDIX A

Statement of Case

CITY OF NEW YORK, Respondent, v. JOHN J. DE LURY, Individually and as President of Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters and Chauffeurs, et al., Appellants.

Argued October 9, 1968; decided November 21, 1968.

Civil service — strikes by public employees — Taylor Law prohibiting strikes by public employees does not deprive union of public employees and its president of due process of law — condemnation of strikes by public employees effectuates valid State policy — prohibition does not violate equal protection clause — public employees and officer of their union are not entitled to jury trial in criminal contempt proceeding — president of union failed to obey court's directive; order adjudging him and union in contempt of court is affirmed.

1. The Taylor Law (Civil Service Law, art. 14, §§ 200–212) prohibiting strikes by public employees does not deprive defendants — a union of sanitation men whose members are employed by plaintiff city and its president — of due process of law. The State, in governing its internal affairs, has the power to prohibit any strike if the prohibition is reasonably calculated to effectuate a valid State policy in an area where it has authority to act.

2. The condemnation of strikes by public employees does effectuate a valid State policy.

3. The prohibition does not violate the equal protection clause. Legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable.

4. A jury trial in a criminal contempt proceeding such as this is not available to public employees or to officers of labor organizations representing them charged with violation of the Taylor Law.

5. The individual defendant, president of the union, failed to obey the directive of the court that the strike be terminated and instead urged his men to make the strike 100% effective. The order adjudging defendants union and its president in contempt of court is affirmed.

City of New York v. *De Lury*, 30 A D 2d 781, affirmed.

APPEAL, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered June 20, 1968, which affirmed orders of the Supreme Court at Special Term (SAUL S. STREIT, J.), entered in New York County, granting a motion by plaintiff for a preliminary injunction and adjudging defendants John J. De Lury and the Uniformed Sanitationmen's Association guilty

Points of Counsel

of criminal contempt. The following question was certified: "Were the orders of the Supreme Court, as affirmed by this Court, properly made?"

Paul O'Dwyer, John J. De Lury, Jr., W. Bernard Richland and *Morris Weissberg* for appellants. I. Defendants, although entitled both by statute and as a matter of constitutional right to trial by jury, were tried by a Justice without a jury, in consequence of which the convictions cannot stand. (*People* v. *Duchin*, 12 N Y 2d 351.) II. A trial for criminal contempt is in all respects a criminal prosecution to which all the exacting requirements designed to protect a defendant apply. Those requirements were ignored here. A conviction of criminal contempt can ensue only upon proof of guilt "beyond a reasonable doubt". Moreover, neither a union nor a union officer can be held responsible at law or in equity for unlawful acts in a labor dispute except upon proof "without the aid of any presumption of law or fact" of its or his performance of such acts and of its or his "actual participation in or actual authorization of such acts." Here there was completely absent any direct evidence of such conduct by either appellant Union or by appellant DeLury, the proof falls far short of what was required and the conviction of each was invalid. (*People ex rel. Valenti* v. *McCloskey*, 8 A D 2d 74, 6 N Y 2d 390; *People* v. *Shapolsky*, 8 A D 2d 122; *Mine Workers* v. *Gibbs*, 383 U. S. 715; *Greenberg* v. *Polansky*, 140 App. Div. 326; *Matter of Wegman's Sons*, 40 App. Div. 632; *Matter of Stratton* v. *Wylie*, 3 Misc 2d 518; *Matter of Sheridan* v. *Kennedy*, 12 A D 2d 332; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492; *Yung Jin Teung* v. *Dulles*, 229 F. 2d 244; *Bothner* v. *Keegan*, 275 App. Div. 470.) III. The suspension of Union dues check-off, imposed as a penal sanction, is founded upon a provision of the Taylor Law which exempts New York City from its application until and unless a designated State agency obtains a judicial declaration that the City has not enacted a local law containing provisions "substantially equivalent" to those of the State statute. Since the obtaining of such judicial declaration is entirely discretionary with the State agency, the provision is an unconstitutional delegation of legislative power to impose penal sanctions and the sanctions

which depend for their validity upon that law are invalid. The New York City local law provisions are drastically disparate from those of the State statute, and for this reason, too, the sanction in regard to Union dues check-off is invalid. (*People* v. *Ryan*, 267 N. Y. 133; *Matter of Lyons* v. *Prince*, 281 N. Y. 557; *People* v. *Grant*, 242 App. Div. 310, 267 N. Y. 508; *Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184; *Matter of Levine* v. *O'Connell*, 275 App. Div. 217, 300 N. Y. 658; *Darweger* v. *Staats*, 267 N. Y. 290; *Matter of Cherry* v. *Board of Regents*, 289 N. Y. 148; *Rutherford* v. *Holmes*, 5 Hun 317, 66 N. Y. 368; *People* v. *Albertson*, 242 App. Div. 450; *Matter of Borden* v. *Tobias*, 42 Misc 2d 1069.) IV. The imposition of the maximum penalties of an $80,000 fine and an 18-month suspension of Union dues check-off was arbitrary, illegal and was based upon the totally unsupported findings that the Union made no efforts to terminate the work stoppage and that the City had no role in provoking it. The facts being directly to the contrary, both the fine and the dues check-off suspension were unauthorized. (*Murphy* v. *Hitchcock*, 244 App. Div. 824, 268 N. Y. 636.) The Taylor Law unconstitutionally deprived defendants of due process of law, and of the equal protection of the laws, by prohibiting them from striking, and by compelling them to continue to work for the Government against their will, without making any provision for payment of just compensation for such continued involuntary labor. (*National Protective Assn.* v. *Cumming*, 170 N. Y. 315; *Exchange Bakery & Rest.* v. *Rifkin*, 245 N. Y. 260; *Interborough R. T. Co.* v. *Lavin*, 247 N. Y. 65; *Reinforce* v. *Birney*, 308 N. Y. 164; *Hunt* v. *Crumboch*, 325 U. S. 821; *Arthur* v. *Oakes*, 63 F. 310; *Pollock* v. *Williams*, 322 U. S. 4; *May's Furs & Ready-to-Wear* v. *Bauer*, 282 N. Y. 331; *Automobile Workers* v. *Wisconsin Bd.*, 336 U. S. 245; *Bus Employees* v. *Wisconsin Bd.*, 340 U. S. 383.

J. Lee Rankin, Corporation Counsel (*Frederic S. Nathan*, *William M. Murphy* and *Laurence D. Cherkis* of counsel), for respondent. I. Neither appellant would have been entitled to a jury trial even if a jury had been requested. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194; *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216; *Goodwins* v. *Hagedorn*, 303 N. Y. 300; *New York City Tr. Auth.* v. *Loos*, 2 Misc

2d 733, 3 A D 2d 740; *New York City Tr. Auth* v. *Loos;* 9 Misc 2d 492; *People ex rel. Frank* v. *McCann,* 253 N. Y. 221; *United States* v. *Barnett,* 376 U. S. 681; *Bradley* v. *O'Hare,* 11 A D 2d 15; *Martin* v. *Curran,* 303 N. Y. 276.) II. The evidence demonstrates beyond a reasonable doubt that De Lury and the Union willfully violated lawful mandates of the court. (*Mount Sinai Hosp.* v. *Davis,* 8 A D 2d 361; *United States* v. *Mine Workers,* 330 U. S. 258; *Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill,* 48 Misc 2d 1021; *New York City Tr. Auth.* v. *Loos,* 2 Misc 2d 733, 3 A D 2d 740; *Lubliner* v. *Reinlib,* 184 Misc. 472; *United States* v. *International Union, United Mine Workers of America,* 77 F. Supp. 563, 177 F. 2d 29, 338 U. S. 871; *United States* v. *Brotherhood of R. R. Trainmen,* 96 F. Supp. 428; *Portland Web Pressmen's Union* v. *Oregonian Pub. Co.,* 188 F. Supp. 859, 286 F. 2d 4, 366 U. S. 912.) III. The court had power under section 751 (subd. 2) of the Judiciary Law to suspend the Union's dues check-off privilege. That power is not impaired because an administrative agency had statutory authority, which it did not use, to bring a judicial proceeding to seek transfer of that power from the courts to the administrative agency. IV. The imposition of the penalties upon the Union was warranted by the evidence. V. The provisions of the Taylor Law prohibiting strikes by public employees are valid under both the State and Federal Constitutions. (*New York City Tr. Auth.* v. *Loos,* 2 Misc 2d 733, 3 A D 2d 740; *Pruzan* v. *Board of Educ. of City of N. Y.,* 25 Misc 2d 945, 12 A D 2d 923, 9 N Y 2d 911; *City of New York* v. *Social Serv. Employees Union,* 48 Misc 2d 820, 25 A D 2d 953; *Matter of Weinstein* v. *New York City Tr. Auth.,* 49 Misc 2d 170; *Di Maggio* v. *Brown,* 19 N Y 2d 283; *Board of Educ. of City of N. Y.* v. *Shanker,* 54 Misc 2d 941, 29 A D 2d 634; *Tennessee Val. Auth.* v. *Local Union No. 110,* 233 F. Supp. 997; *Amell* v. *United States,* 384 U. S. 158; *National Protective Assn.* v. *Cumming,* 170 N. Y. 315; *Exchange Bakery & Rest.* v. *Rifkin,* 245 N. Y. 260; *Hunt* v. *Crumboch,* 325 U. S. 821.)

Chief Judge FULD. We recently decided, in *Rankin* v. *Shanker* (23 N Y 2d 111), that public employees and labor organizations representing them were not entitled to a trial by jury in a criminal contempt proceeding for the violation of sec-

tion 210 (subd. 1) of the Taylor Law.[1] In so holding, we concluded that a legislative classification "which differentiates between strikes by public employees and employees in private industry" is reasonable and does not offend against the constitutional guarantee of equal protection of the laws (23 N Y 2d, at p. 118). The case now before us calls upon the court to determine, primarily, whether the Taylor Law's mandate that public employees shall not strike and that labor organizations representing them shall not cause or encourage a strike violates due process requirements of the State or Federal Constitution.

At about seven o'clock in the morning of February 2, 1968, virtually all of the sanitation men in the City of New York — employees of the Department of Sanitation — failed, without excuse, to report for work.[2] Later in the day, at a demonstration

1. The Taylor Law was enacted in 1967 (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212) to supersede the Condon-Wadlin Act (L. 1947, ch. 391, adding Civil Service Law, former § 22-a, renum. by L. 1958, ch. 790, as Civil Service Law, former § 108). Like its predecessor, the Taylor Law prohibits strikes by public employees (§ 210, subd. 1) but, unlike Condon-Wadlin, it does not mandate termination of employment for its violation. The Taylor Law grants to all public employees (which, broadly speaking, includes all employees in the service of the State or any subdivision thereof) rights which in the main they did not formerly possess, namely, the right to be represented by employee organizations of their own choosing and the right to negotiate collectively with public employers and, in addition, the right to require public employers to negotiate and to enter into collective agreements with them. It sets up a Public Employment Relations Board — known as PERB — to "resolve • • • disputes concerning the representation status of employee organizations" and to assist in the "voluntary resolution" of disputes between public employers and employee organizations. It also authorizes, under the so-called "home rule" section (Civil Service Law, § 212), the adoption by local governments of "provisions and procedures" which are "substantially equivalent" to those of the Taylor Law. The New York City equivalent of such law is Local Law No. 53 of 1967 but the parties did not utilize the machinery therein provided for resolving disputes between the city and municipal employee organizations. All public employees, whether or not covered by the "home rule" section (§ 212), are subject to the statutory mandate of section 210 (subd. 1) of the Civil Service Law prohibiting them from striking.

2. The City and the Uniformed Sanitationmen's Association had labored long in an attempt to arrive at a new collective agreement to replace one which expired on June 30, 1967. Bargaining between the parties, which commenced in December of 1966, had dragged along for the entire year of 1967 and through January, 1968. On January 31, 1968, a mutually agreed upon mediation panel formulated a settlement agreement which, though accepted by the City, was rejected by the Union stewards.

in front of City Hall, members of the Uniformed Sanitationmen's Association (referred to herein as the "Union") were addressed by their president, the defendant De Lury, in these words:

> "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes (cheers). All opposed (boos). I didn't come here to bargain, I took a firm position with the City, I gave the members a final offer of this union. Now I want to show discipline here this morning—or this afternoon—I don't want to show where there is confusion in the members—You got a job at the locations to see that this is effective 100% (cheers)."

A nine-day strike, ending on the night of February 10, resulted. During that period, few, if any, of the sanitation men reported for work, in consequence of which garbage and refuse accumulated on the city streets at the rate of 10,000 tons a day. This constituted a serious health and fire threat; indeed, the Commissioner of Health characterized the "garbage situation" as "a serious one to the health of the city" and the Fire Commissioner declared that the Fire Department "experienced a marked increase in the number of outside rubbish fires".[3]

On February 2, the very day the work stoppage began, the City instituted the present action to enjoin the defendants from "striking" and moved for a preliminary injunction. A temporary restraining order was granted which enjoined the carrying on of the strike and required the leaders of the Union to instruct the members to return to work. Three days later, on February 5, the court at Special Term granted a preliminary injunction which again contained a directive to De Lury that he shall "forthwith instruct all members [of the Union] not to engage or participate in any strike, concerted stoppage of work or concerted slowdown against the plaintiff." Although, because of the health and fire hazards involved, immediate compliance with the orders was vital, the members of the Union, as previously noted, remained away from their jobs until February 10.

3. On the sixth day of the strike, a volunteer group of some 500 men collected hospital refuse, the accumulation of which created an especially dangerous threat of disease.

An application, brought on by order to show cause, to punish the Union and De Lury for criminal contempt for willfully disobeying the restraining order, came on for hearing before the court; the testimony adduced concerning the strike and its effects, as well as the conduct of De Lury, was substantially as outlined above. When the City, through its Corporation Counsel, stated that it was prepared to call witnesses to establish that the sanitation men " had [not] received instructions from Mr. De Lury to report back to work ", defense counsel conceded that, if witnesses were called to the stand — as the Corporation Counsel proposed — " they would testify that they did not receive any instructions from Mr. De Lury to go back, because Mr. De Lury did not send them out, and Mr. De Lury did nothing to bring them back. These are the facts which are known to everybody. "[4]

At the conclusion of the hearings, the court, dismissing charges which had also been asserted against other officers, found De Lury and the Union guilty of criminal contempt for willfully disobeying its lawful mandate. It sentenced De Lury to 15 days in jail and fined him $250 and it fined the Union $80,000; in addition, the court ordered that the Union's right to dues check-off be forfeited for a period of 18 months.[5] The Appellate Division affirmed Special Term's orders and granted the defendants leave to appeal to our court on a certified question.

We consider, first, the defendants' contention that the Taylor Law is unconstitutional on the ground that, in prohibiting strikes by public employees, it deprives them of due process of law. Manifestly, neither the Fourteenth Amendment to the Federal Constitution nor the Bill of Rights of the State Constitution (art. I) grants to any individual an absolute right to strike. On the contrary, that right is subject to the qualification that, if a strike is for an illegal objective, it is enjoinable at the instance of an aggrieved party. To cull from the opinion of the Supreme Court in *Auto Workers* v. *Wisconsin Bd.* (336 U. S. 245, 259–260), " ' the exercise of the unquestioned right to [strike] ' * * * did not operate to legalize the sit-down strike, which

4. The City was ready to call 10 witnesses, having planned to issue 100 subpœnas addressed to that number of employees.

5. The fines imposed, as well as the period for which the Union's dues check-off rights were forfeited, were the maximum authorized by the applicable statute (Judiciary Law, § 751, subds. 1, 2, par. [a]).

state law made illegal and state authorities punished. [Case cited.] Nor, for example, did it make legal a strike that ran afoul of federal law [case cited]; nor one in violation of a contract made pursuant thereto [case cited]; nor one creating a national emergency [case cited]."

Although acknowledging that the right to strike is not absolute, the defendants would have us read the opinion in the *Auto Workers* case to mean that a prohibition against strikes will be upheld only where workers strike in violation of a no-strike clause or where there is a secondary boycott, violence or a trespass such as a sitdown. There is no basis for so narrowly viewing that decision. The Supreme Court did not limit the doctrine there applied to instances of illegal strikes mentioned by it. Rather, it laid down a general rule, applicable in all cases involving illegal strikes, namely, that the State, in governing its internal affairs, had the power to prohibit *any* strike if the prohibition was reasonably calculated to achieve a valid State policy in an area which was open to State regulation. (Cf. *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284, 294–295.)

Our query must, therefore, be whether the condemnation of strikes by public employees, as provided in the Taylor Law, does effectuate a valid policy of our State.

For many years, strikes against the Government have been outlawed by special legislation and by common law. Today, no less than 20 States have statutes condemning strikes by some or all of its public employees and at least seven States have achieved the same result by the application of common-law principles. (See Rubin, A Summary of State Collective Bargaining Law in Public Employment, published by Cornell University in 1968.) In addition, a Federal statute specifically provides that strikes by Federal employees are illegal (U. S. Code, tit. 5, § 7311). Substantial reasons are at hand for this almost universal condemnation of strikes by public employees. As Professor George W. Taylor, an outstanding authority in the field of labor relations and one of the architects of the Taylor Law, put it (Public Employment: Strikes or Procedures?, 20 Industrial and Labor Relations Rev. 617, 619),

> "One of the vital interests of the public which should be conserved in the government-employee relationship is the ability of representative government to perform the

> functions of levying taxes and, through the budgeting of governmental resources, of establishing priorities among the government services desired by the body politic."

Quite obviously, the ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could obtain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequence would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives but from the coercive effect of paralyzing strikes of public employees. (See Final Report [March 31, 1966] of the Governor's Commission on Public Employment Relations [hereafter referred to as the Taylor Report], pp. 15–16).

It was undoubtedly because of such considerations that Governor Thomas E. Dewey, in his Memorandum approving the Condon-Wadlin Act (L. 1947, ch. 391) — the predecessor of the Taylor Law — declared (N. Y. Legis. Ann., 1947, pp. 36–37):

> "The duty of public employees is to the whole of society. A strike of firemen could overnight permit the destruction of a whole city. A strike of police could endanger the safety of millions of people and all their possessions. A strike of sanitation workers could almost overnight produce an epidemic threatening the lives of other millions of people".

And President Franklin D. Roosevelt expressed himself in similar fashion in 1937, some 10 years earlier (Public Papers and Addresses for Year 1937 [1941] Letter of Aug. 16, 1937, p. 325):

> "Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is para-

mount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable."

The courts which have dealt with the constitutional question under discussion have concluded that no provision of either the Federal or State Constitution prevents the State from outlawing strikes by public employees. Thus, our court (*Matter of Di Maggio* v. *Brown*, 19 N Y 2d 283; *Pruzan* v. *Board of Educ.*, 9 N Y 2d 911, affg. 12 A D 2d 923, affg. 25 Misc 2d 945; see, also, *City of New York* v. *Social Serv. Employees Union*, 48 Misc 2d 820), as well as the courts of sister States (see, e.g., *Norwalk Teachers' Assn.* v. *Board of Educ.*, 138 Conn. 269; *Detroit* v. *Division 26 of Amalgamated Assn.*, 332 Mich. 237, app. dsmd. 344 U. S. 805; *Cleveland* v. *Division 268 of Amalgamated Assn.*, 41 Ohio Op. 236), have expressly rejected constitutional objections to legislation prohibiting and punishing strikes by public employees. Indeed, in upholding the constitutionality of the Condon-Wadlin Act in the *Di Maggio case* (19 N Y 2d 283, *supra*), Judge BURKE, writing for a unanimous court, had this to say about that statute (pp. 287–288):

"Petitioners claim that Condon-Wadlin is unconstitutional on its face because it constitutes a bill of attainder, imposes excessive fines and inflicts cruel and unusual punishment. None of these allegations is sustainable. In *Pruzan* v. *Board of Educ.* (9 N Y 2d 911 [1961]) the constitutionality of Condon-Wadlin was at least impliedly asserted. Moreover, it cannot reasonably be said that the law constitutes a bill of attainder, 'a legislative act which inflicts punishment without a judicial trial.' (*Cummings* v. *Missouri*, 4 Wall. [71 U. S.] 277, 323 [1866].) *There is no constitutional provision which vests one with the right to governmental employment, or which bars the imposition of reasonable and necessary limitations and conditions on*

> *such employment.* Consequently, a statute which incorporates such limitations on governmental employment cannot be construed as a bill of attainder. There is numerous authority to the effect that *it is against public policy for public employees to strike,* and many courts have held that such a strike is unlawful, illegal and may be restrained and enjoined." (Emphasis supplied.)

In the case before us, the Legislature, after declaring (Civil Service Law, § 200) that "it is the public policy of the state * * * to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government", recited that such policy is best effectuated by "continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition." Furthermore, the Taylor Report, which preceded the enactment of the Taylor Law, found, after an exhaustive study of the matter, that the right of public employees to strike "is not compatible with the orderly functioning of our democratic form of representative government" (p. 19).

In view of the strong policy considerations which led to the enactment of the Taylor Law, it is our conclusion that the statutory prohibition against strikes by public employees is reasonably designed to effectuate a valid State policy in an area where it has authority to act and that the provisions of subdivision 1 of section 210 do not offend any due process rights of the defendants.

In view of our recent decision in the *Shanker* case (23 N Y 2d 111, *supra*), no extended discussion is required in addressing ourselves to the defendants' point that the prohibition against strikes by public employees (or their representative organizations) violates the equal protection clause of either the United States or the New York State Constitution. (See, for a recent discussion of the problem of equal protection of laws, *Locomotive Firemen* v. *Chicago, R. I. & P. R. R. Co.*, —— U. S. —— [37 U. S. Law Week 4032, decided Nov. 18, 1968]; *New York Cent R. R. Co.* v. *Lefkowitz*, 23 N Y 2d 1.) As we had occasion to observe in *Shanker* (23 N Y 2d, at p. 116),

> "Ever since the enactment of the Norris-LaGuardia Act and our State's Little Norris-LaGuardia Act, the view has been uniformly and consistently held that a legitimate distinction between public and private employment is constitutionally permissible. This has been recognized * * * with regard not only to the prohibition against strikes but also to the issue, now confronting us, affecting jury trials."

There are a number of factual differences between employment in the public and private sectors which furnish reasonable justification for disparate treatment vis-à-vis the right to strike. Thus, for instance, the necessity for preventing goods or services being priced out of the market may have a deterrent effect upon collective bargaining negotiations in the private sector, whereas, in the public sector, the market place has no such restraining effect upon the negotiations and the sole constraint in terms of the negotiations is to be found in the budget allocation made by responsible legislators. Again, the orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to make budgetary allocations—free from the compulsions of crippling strikes—require the regulation of strikes by public employees whereas there is no similar countervailing reason for a prohibition of strikes in the private sector. (See Taylor Report, pp. 15–16.) Nor does the fact that many employees in private industry also perform vital services render the distinction unreasonable. As to this, it is sufficient to note that, although the Legislature is not barred from enacting laws regulating the relationship between the State or its subdivisions and public employees, it cannot regulate labor relations in the private sector with respect to most industries (e.g., privately owned railroads, airlines, etc.) where a strike could paralyze a city without, as we observed in the *Rankin* case, running into conflict with Federal legislation, such as the National Labor Relations Act and the Railway Labor Act, and thereby violating "the exclusive primary jurisdiction of Federal administrative agencies vested with the authority to deal with such matters" (23 N Y 2d, at p. 118, n. 3).

In view of the basic differences between public and private employment, it may not be said that a classification which pro-

hibits strikes by public employees while failing to legislate against strikes by employees in the private sector is unreasonable, especially when it is considered that strikes by public employees, unlike private employees, have always been subject to injunctions by the courts. Consequently, we conclude here, just as we did in *Rankin* (p. 119) that, "as of the present [time], legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable."

The defendants' argument — that they are entitled to a trial by jury despite their failure to request one — may be disposed of summarily. In our decision in *Rankin* v. *Shanker* (23 N Y 2d 119, *supra*), as the lines already quoted from the opinion in that case establish, we expressly held that a jury trial in a criminal contempt proceeding such as this (under Judiciary Law, § 753-a and Labor Law, § 808) is not available to public employees, or to officers of labor organizations representing them, charged with violation of the Taylor Law (Civil Service Law, § 200 *et seq.*). This, of course, applies equally to the present defendants.

Nor is there any substance to the further contention that the city failed to prove there is evidence that De Lury disobeyed any mandate of the court. The strike was open and notorious. Its devastating impact on the City of New York and its inhabitants, including the danger of fire and the hazard to health, was known to the defendant, as it was to all New Yorkers. The court's order that the strike be terminated and that De Lury, as president of the Union, instruct his men "not to engage or participate in" the strike was clear beyond cavil. The defendant not only failed to obey that injunction but, going to the other extreme, actually urged the men to make the strike "effective 100%". What the proof convincingly demonstrated, the concession of the defendant's counsel rendered indisputable. We cannot accept the highly technical or hair-splitting arguments urged upon us in an attempt to evade compliance with the court's lawful mandates. Indeed, when confronted with a somewhat similar situation in *United States* v. *Mine Workers* (330 U. S. 258, 307, concurring opn.) — a case in which an adjudication of criminal contempt was based on disobedience of an order enjoin-

ing a strike — Mr. Justice FRANKFURTER, after observing that we are "'a government of laws and not of men'" (p. 307), went on to say in language most appropriate here (p. 312):

> "In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it."

We have considered each of the other arguments advanced by the defendants and find them so tenuous as to require no comment.

In conclusion, then — subdivision 1 of section 210 of the Civil Service Law, designed to prevent the paralysis of Government, offends against no constitutional guarantee or requirement. Self-interest of individual or organization may not be permitted to endanger the safety, health or public welfare of the State or any of its subdivisions. There was here indisputable proof not only of deliberate disobedience of the explicit provisions of the Taylor Law but willful defiance of the court's lawful mandates as well. Such defiance, the more egregious when committed by employees in the public sector, is not to be tolerated.

The order appealed from should be affirmed, with costs, and the question certified answered in the affirmative.

Opinion by Chief Judge FULD. All concur, Judges BURKE, BERGAN and KEATING on constraint of this court's decision in *Rankin* v. *Shanker* (23 N Y 2d 111) insofar as the right to a jury trial is concerned.

Appendix B

(MAJORITY AND DISSENTING OPINIONS OF NEW YORK COURT OF APPEALS IN *Rankin* v. *Shanker* (23 N.Y. 2d 111))

(PHOTOSTATS)

(See opposite ☛)

Statement of Case

J. LEE RANKIN, Corporation Counsel of the City of New York, on Behalf of the Board of Education of the City of New York, Respondent, *v.* ALBERT SHANKER, Individually and on Behalf of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, et al., Appellants.

J. LEE RANKIN, Corporation Counsel of the City of New York, on Behalf of the Board of Education of the City of New York, Respondent, *v.* ALBERT SHANKER, Individually and as President of the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, et al., Defendants, and WALTER J. DEGNAN, Individually and as President of the Council of Supervisory Associations, et al., Appellants.

Argued October 29, 1968; decided October 30, 1968.

Contempt — criminal contempt — jury trial — public employees and unions which represent them are not entitled, as matter of right, to jury trial in criminal contempt proceeding brought for alleged violation of Taylor Law in that they engaged in strike or instigated, encouraged or condoned the strike.

1. Public employees and the unions which represent them are not entitled, as a matter of right, to trial by jury in a criminal contempt proceeding brought against them for alleged violation of the Taylor Law (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212), in that the employees engaged in a strike and the organizations instigated, encouraged or condoned such strike.

2. Section 753-a of the Judiciary Law and section 808 of the Labor Law grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute". The Legislature did not intend to apply those sections to strikes by public employees.

3. To refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not deny the equal protection of the laws under the Constitution of either the United States or New York State. A distinction between public and private employment is constitutionally permissible.

4. The Federal Constitution (art. III, § 2; 5th, 6th, 14th Amdts.) does not require that defendants be accorded a trial by jury in a contempt proceeding where the maximum term of imprisonment authorized is 30 days. (*Bloom* v. *Illinois*, 391 U. S. 194, distinguished.)

Rankin v. *Shanker*, 30 A D 2d 956, affirmed.

APPEAL in each of the above-entitled cases, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered October

Points of Counsel

24, 1968, which affirmed an order of the Supreme Court (FRANCIS J. BLOUSTEIN, J.), entered in New York County, denying motions by defendants for a jury trial in a proceeding to punish them for a criminal contempt of court. The following question was certified: "Whether or not Judiciary Law § 753-a(1), or Labor Law § 808, or Article I, Section 2 of the Constitution of the State of New York, or the 14th Amendment of the United States Constitution guarantees the right to a jury trial in a criminal contempt proceeding for an alleged violation of a Court order made pursuant to Civil Service Law § 211."

Ralph R. Katz, Ernest Fleischman, Stephen F. Gordon and *Martin R. Ganzglass* for Albert Shanker and another, appellants. I. Section 753-a of the Judiciary Law and section 808 of the Labor Law give defendants the right to a jury trial. (*Brown* v. *State of Maryland*, 12 Wheat. [25 U. S.] 419; *Goodwins* v. *Hagedorn*, 303 N. Y. 300; *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 3 A D 2d 740; *New York City Tr. Auth.* v. *Loos*, 9 Misc. 2d 492; *Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill*, 48 Misc 2d 1020; *People ex rel. Choate* v. *Barrett*, 121 N. Y. 678; *Matter of Savin*, 131 U. S. 267.) II. The Federal Constitution and decisions of the United States Supreme Court require that defendants be granted a jury trial in the contempt proceeding. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 194; *Cheff* v. *Schnackenberg*, 384 U. S. 373.) III. Under the Constitution of the State of New York defendants have a right to a trial by jury. (*Matter of Leary*, 175 Misc. 254; *Matter of Werner* v. *Reid*, 260 App. Div. 1000; *Matter of Leary*, 285 N. Y. 693; *People ex rel. Wood* v. *Draper*, 15 N. Y. 532.) IV. The denial of a jury trial to defendants would constitute a constitutional deprivation of the equal protection of the laws. (*Griffin* v. *Illinois*, 351 U. S. 12; *Rapid Tr. Corp.* v. *New York*, 303 U. S. 573; *Queensboro Farms Prods.* v. *Wickard*, 137 F. 2d 969.) V. A discrimination between private and public employees with respect to the right to a trial by jury for a contempt growing out of a labor dispute is a denial of equal protection of the laws because there is no reasonable and just relationship between such a distinction and the purpose of the provision establishing the right to a trial by jury. (*Morey* v. *Doud*, 354 U. S. 457; *Myer* v. *Myer*, 271 App. Div. 465; *Thompson* v. *Shapiro*, 270 F. Supp. 331.)

Opinion per Chief Judge FULD

Max H. Frankle, Everett E. Lewis and *Bernard Yaker* for Walter J. Degnan and others, appellants. I. The court below erred in denying defendants-appellants a jury trial on criminal contempt charges. (*Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286; *New York State Bridge Auth.* v. *Moore*, 299 N. Y. 410; *Matter of Bailey* [*Bush Term. Co.*], 265 App. Div. 758, 291 N. Y. 534; *Dwight* v. *Enos*, 9 N. Y. 470; *People* v. *Dethloff*, 283 N. Y. 309; *Anderson* v. *Mather*, 44 N. Y. 249; *Owners & Tenants Elec. Co.* v. *Tractenberg*, 158 Misc. 677; *Matter of Hering* v. *Clement*, 133 App. Div. 293, 196 N. Y. 218; *People ex rel. Woodbury* v. *Hendrick*, 215 N. Y. 339.) II. The Federal Constitution mandates a jury trial in the criminal contempt proceeding herein. (*Duncan* v. *Louisiana*, 391 U. S. 145; *Bloom* v. *Illinois*, 391 U. S. 144; *United States* v. *United Mine Workers*, 330 U. S. 258.)

J. Lee Rankin, Corporation Counsel (*Frederic S. Nathan, William M. Murphy* and *Laurence D. Cherkis* of counsel), for respondent. I. Defendants' demands for a jury were properly rejected in a criminal contempt trial for willful disobedience of a court order issued pursuant to the Taylor Act enjoining a strike by public employees against the Government. (*Dyke* v. *Taylor Implement Co.*, 391 U. S. 216; *DeStefano* v. *Woods*, 392 U. S. 631; *Bradley* v. *O'Hare*, 11 A D 2d 15; *Martin* v. *Curran*, 303 N. Y. 276; *Ostrom* v. *Greene*, 161 N. Y. 353; *Ex parte Wilson*, 114 U. S. 417; *People* v. *Bellinger*, 269 N. Y. 265; *Matter of McKinney* v. *Hamilton*, 282 N. Y. 393; *United States* v. *United Mine Workers*, 330 U. S. 258; *Jewish Hosp. of Brooklyn* v. *"John Doe"*, 252 App. Div. 581.)

Chief Judge FULD. These appeals require us to pass upon a fundamental question of high importance in connection with the enforcement of the provisions of the recently enacted Taylor Law (L. 1967, ch. 392; Civil Service Law, art. 14, §§ 200–212). Are public employees or the unions which represent them entitled, as a matter of right, to trial by jury in a criminal contempt proceeding brought against them for alleged violation of section 210 (subd. 1) of that statute, in that (as to the employees) they engaged in a strike and (as to the organizations) they instigated, encouraged or condoned such strike?

Opinion per Chief Judge FULD

In the present case, the Corporation Counsel of the City of New York sought an order — pursuant to section 211 of the Civil Service Law and sections 750 and 751 of the Judiciary Law — to punish the defendants for criminal contempt, claiming that they had willfully disobeyed the restraining provisions of the temporary injunction issued by the Supreme Court on September 9, 1968. The defendants' demand for a trial by jury, based on their claim that they are entitled to such a trial as a matter of right by virtue of statutory and constitutional provisions, was rejected by Special Term, and its resulting orders were unanimously affirmed by the Appellate Division. The appeals are before us by leave of the latter court on certified questions.

The statutory provisions on which the several defendants rely are section 753-a of the Judiciary Law and section 808 of the Labor Law (formerly Civ. Prac. Act, § 882-a). Those sections, in substantially identical language, grant the right of jury trial in a proceeding to punish, as a criminal contempt, a failure or refusal to obey an injunction order granted "in any case involving or growing out of a labor dispute". It is urged by the defendants that the legislative design to apply those sections to strikes by public employees (§ 210, subd. 1) is demonstrated by the fact that, whereas the Legislature expressly provided that section 807 of the Labor Law[1] is inapplicable to injunctions to restrain violations of section 210 (subd. 1), no similar exclusionary language applies to section 808. We find no substance to this argument.

Our discussion of the statutory question may well begin by noting that a primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature. In finding such purpose, one should look to the entire statute, its legislative history and the statutes of which it is made a part. (See, e.g., *Matter of Hogan* v. *Culkin*, 18 N Y 2d 330, 335; *Levine* v. *Bornstein*, 4 N Y 2d 241, 244; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes, §§ 92, 95, 96, 97, 98, 111.)

1. This section restricts or limits the issuance of injunctions in "labor dispute" cases. Section 807 (formerly Civ. Prac. Act, § 876-a) and section 808 (formerly Civ. Prac. Act, § 882-a) are counterparts of the Norris-LaGuardia Act (47 U. S. Stat. 70; U. S. Code, tit. 29, §§ 101-115; also U. S. Code, tit. 18, § 3692).

Section 807 and section 808 of the Labor Law (as well as Judiciary Law, § 753-a) are but the identically worded successors of a statutory provision enacted in the 1930s which constituted this State's Little Norris-LaGuardia Act (Civ. Prac. Act, § 876-a), named for its Federal prototype, the Norris-LaGuardia Act (47 U. S. Stat. 70; U. S. Code, tit. 29, §§ 101–115). Accordingly, in determining the reach of the new statutes, we find it highly significant that for the past three decades their predecessors have been held inapplicable to public employees. More specifically, the courts have ruled that such provisions — both those restricting or limiting the issuance of labor injunctions and those granting the right of trial by jury in criminal contempt proceedings involving labor disputes — apply solely to employees in private industry and not to those in public employment. (See *United States* v. *Mine Workers*, 330 U. S. 258, 298; *Jewish Hosp. of Brooklyn* v. *"John Doe"*, 252 App. Div. 581, 585; see, also, *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 742, affd. 3 A D 2d 740; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492, 493.) It is overly simplistic reasoning to assume that the Legislature, in excluding the provisions of section 807 from the application of the Taylor Law, but failing similarly to mention section 808, intended to grant the right of trial by jury to public employees, a right which they had never previously possessed under the latter section.

If it had been the design of the Legislature to grant such a right, that body would undoubtedly have done so expressly and unequivocally. There is nothing in the provisions under consideration relating to jury trials (Labor Law, §§ 807, 808; Judiciary Law, § 753-a) which discloses any concern with, or application to, public employment. In point of fact, when we look to the legislative history which preceded and accompanied the enactment of the Taylor Law, there is no suggestion that any one, in or out of the Legislature, proposed trial by jury in contempt proceedings for its violation. It is inconceivable, we suggest, that so vital and salient a feature would not have been enacted, let alone not mentioned, by the Legislature if there had been any design or desire to provide therefor. To accept the position of our dissenting brothers would ascribe to the Legislature an intention not only to

override decisions on the books for upwards of 30 years, which denied the right to trial by jury to public employees (see *supra*, p. 115), but also to nullify the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." (*United States* v. *Mine Workers*, 330 U. S. 258, 272, *supra*.)

The conclusion, therefore, is clear. The Taylor Law was never intended to, and does not, make provision for jury trials in contempt enforcement proceedings; the reference in the Taylor Law to section 807 cannot possibly create a right to a jury trial under section 808.

Nor do we find any basis for a claim that a denial of a jury trial in this case offends against any constitutional provision. Contrary to the defendants' contention, to refuse a trial by jury to public employees or their representative organizations and to grant it to those in private industry does not violate the equal protection of the laws under the Constitution of either the United States or New York State. Ever since the enactment of the Norris-LaGuardia Act and our State's Little Norris-LaGuardia Act, the view has been uniformly and consistently held that a legitimate distinction between public and private employment is constitutionally permissible. This has been recognized, we note, with regard not only to the prohibition against strikes but also to the issue, now confronting us, affecting jury trials. (See *United States* v. *Mine Workers*, 330 U. S. 258, 298, *supra*; *Jewish Hosp. of Brooklyn* v. "*John Doe*", 252 App. Div. 581, 585, *supra*; see, also, *New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 742, affd. 3 A D 2d 740, *supra*; *New York City Tr. Auth.* v. *Loos*, 9 Misc 2d 492, 493, *supra*.) Indeed, the Supreme Court, explicitly dealing with the problem in the *Mine Workers* case — where the miners were governmental employees — declared (330 U. S., at p. 298):

> "Not only were the defendants fully informed that a criminal contempt was charged, but we think they enjoyed during the trial itself all the enhanced protections accorded defendants in criminal contempt proceedings. We need not treat these at length, for defendants, in this respect, urge only their right to a jury trial as provided in § 11 of the

Norris-LaGuardia Act. But § 11 is not operative here, for it applies only to cases 'arising under this Act,' and we have already held that the restriction upon injunctions imposed by the Act do not govern this case. The defendants, we think, were properly tried by the court without a jury."

There is at least one vital reason why a jury trial is not appropriate or desirable in applying sanctions for violation of statutes regulating labor relations with public employees or their representative organizations. Prompt determinations, unencumbered by the long, drawn-out procedures involved in jury trials, are needed in criminal contempt proceedings under the Taylor Law in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders.[2] It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giv-

2. Under the Judiciary Law (§ 751, subd. 2, par. [d], cl. [i]), a labor organization appealing an adjudication and fine for criminal contempt is not required to pay the fine until the appeal has been finally determined. Based on that provision, it is urged in the dissenting opinion of Judge KEATING (p. 133) that the Legislature sanctions delay in carrying out the punishment imposed on unions in such contempt proceedings and, hence — to quote from the dissent — "the purported justification [mentioned in the court's opinion] for denying a jury trial has no application at all." However, what the dissent overlooks is the further provision of the Judiciary Law (§ 751, subd. 2, par. [d], cl. [ii]) which, in order to reduce to a minimum delays due to appeals, requires the appellate courts to "grant a preference in the hearing thereof." No similar grace period pending appeal is granted to union leaders for commencement of imprisonment for contempt, and in at least one of New York City's recent major strikes in the public sector the leader was imprisoned during the continuation of the strike. That the Legislature intended the courts to utilize the criminal contempt proceedings as a means of promptly putting an end to illegal strikes by public employees is likewise apparent from the following statement contained in the Final Report (March 31, 1966) of the Governor's Committee on Public Employee Relations which led to the enactment of the Taylor Law (p. 43): "To this end [namely, the termination of illegal strikes in violation of section 210 of the Civil Service Law] we recommend that it may be made obligatory by law for specified law officers to initiate court action for injunctive relief before any strike breaks out as soon as it can be proven that it is about to occur, and if the resulting order or decree of the court is violated *to institute a criminal contempt proceeding promptly.*" (Emphasis supplied.)

ing the courts the powers necessary to bring about their early termination. Such strikes, if caused by firemen, could "overnight permit the destruction of a whole city", or if by policemen could "endanger the safety of millions of people and of all their possessions", or if called by sanitation workers could "almost overnight produce an epidemic threatening the lives of other millions of people." (Memorandum of Governor Dewey, approving Condon-Wadlin Act [L. 1947, ch. 391], N. Y. Legis. Ann., 1947, pp. 36–37.) And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and statutory right to a basic education — thereby severely handicapping them in their efforts to attain higher education and future employment — but it would also impair their respect for law.

Strikes by employees in certain private industries may, as Judge KEATING notes in dissent (opn., p. 134), be just as paralyzing in their impact upon the public as strikes by workers in public employment. But the Legislature has not seen fit to legislate with regard to such strikes.[3] And, just as a classification is not deemed unreasonable which differentiates between strikes by public employees and employees in private industry,[4]

3. Our Legislature, distinguishing between "private" and "public" employees, has refrained from enacting laws prohibiting strikes — which might have a crippling effect on a city — by employees of private utilities, privately owned railroads, shipping lines and other similar private industries. The Legislature's failure to act in the private sector is undoubtedly due to the fact that such provisions might conflict with Federal legislation, such as the National Labor Relations Act (U. S. Code, tit. 29, § 151 *et seq.*) and the Railway Labor Act (U. S. Code, tit. 45, § 151 *et seq.*) and might thereby violate the exclusive primary jurisdiction of Federal administrative agencies vested with the authority to deal with such matters. (See, e.g., *San Diego Unions* v. *Garman*, 359 U. S. 236.)

4. The policy reasons for distinguishing between public and private employees are succinctly set forth in the afore-mentioned Final Report of the Governor's Committee on Public Employee Relations (pp. 18–19): "Careful thought about the matter [that is, the distinction between strikes by public and private employees] shows conclusively, we believe, that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative polical power is the final determinant)."

so a classification may not be subjected to attack which denies a jury trial to public employees whose willful defiance of the prohibition against strikes, if not brought to an immediate end (without the delay occasioned by possibly long, drawn-out jury trials), might cripple a city. As the Supreme Court not too long ago had occasion to observe (*McGowan* v. *Maryland*, 366 U. S. 420, 425–426):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. *The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.* State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (Emphasis supplied.)

Certainly, a reasonable distinction may be drawn between public and private employment; reasonableness of a classification under constitutional standards is always influenced by time and circumstances. It is sufficient to note that, as of the present, legislative differentiation between public and private employees, insofar as restrictions on their right to strike and to jury trials are concerned, is reasonable.

The defendants' further contention that the Federal Constitution (art. III, § 2; 5th, 6th, 14th Amdts.) requires that they be accorded a trial by jury is likewise without merit. *Bloom* v. *Illinois* (391 U. S. 194), contrary to the defendants' argument, does not stand for the proposition that the Fourteenth Amendment guarantees the right to a jury trial in every contempt proceeding in State courts. The decision in *Bloom* is plainly limited in its application to "serious" crimes in contradistinction to "petty" offenses (e.g., p. 197; see, also, *Dyke* v. *Taylor Implement Co.*, 391 U. S. 216, 220; *DeStefano* v. *Woods*, 392 U. S. 631, 633). In the *Dyke* case (391 U. S. 216, *supra*), for instance, the Supreme Court, after observing that it had not drawn a precise line "between punishments that can be

considered 'petty' and those that cannot be", went on to say that "it is clear"—from its decision in *Cheff* v. *Schnackenberg* (384 U. S. 373)—"that a six-month sentence is short enough to be 'petty.'" In the case before us, it is sufficient to point out that the maximum punishment to which the individual defendants are subject—if found guilty—is 30 days in jail and a fine of $250 (Judiciary Law, § 751, subd. 1).

Nor does the penalty to which defendant unions are subject—a fine of $10,000 a day or one fifty second (1/52) of the total amount of annual membership dues, "whichever is the lesser" (Judiciary Law, § 751, subd. 2, par. [a])[5]—render the contempt a "serious" crime. The determination, whether it is serious or petty under the decisions, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence. (See *Ex parte Wilson*, 114 U. S. 417, 428; *People* v. *Bellinger*, 269 N. Y. 265, 271; *Matter of McKinney* v. *Hamilton*, 282 N. Y. 393, 397.) Consequently, as the cases reveal, the fine, even though sizeable in amount,[6] furnishes no valid criterion for the defendants' claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any relevance, the fine—which in the last analysis must be borne by the union membership (see, e.g., *Martin* v. *Curran*, 303 N. Y. 276, 281)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt.

In sum, then, we find that no constitutional or statutory right of the defendants will be transgressed by a trial of the criminal contempt charge without a jury.

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5. It is also asserted that, in dealing with the question whether a serious crime is here involved, this court should consider that the labor organizations may be compelled to forfeit their membership dues deduction privileges for a period not to exceed 18 months (Civil Service Law, § 210, subd. 3 par. [f]). Since no action has been taken by any governmental official, as required by section 210 of the Civil Service Law, and none can result from the present contempt proceedings, the fact that such forfeiture may occur at some future date has no relevance to the question now before us.

6. It should be noted, in passing, that, although a fine of $700,000 was imposed on defendant labor organization in *United States* v. *Mine Workers* (330 U. S. 258, *supra*), the Supreme Court held that the defendant had no right of trial by jury. And in *Cheff* v. *Schnackenberg* (384 U. S. 373, *supra*), a demand for a jury trial was held properly denied in a criminal contempt case even though one of the defendants had been fined $100,000.

The orders appealed from should be affirmed, without costs, and the questions certified answered in the negative.

BURKE, J. (dissenting). The order seeking to place these defendants in contempt is predicated on the Public Employees' Fair Employment Act, more popularly known as the Taylor Act (Civil Service Law, §§ 200–212), and article 19 of the Judiciary Law (Judiciary Law, §§ 750–781). Section 210 of the Taylor Act specifically provides that a public employee who condones, causes or instigates a strike " shall be subject to the disciplinary penalties provided by law for misconduct, *in accordance with procedures established by law.*" (Civil Service Law, § 210; emphasis added.) Such procedures are contained in the Judiciary Law and Labor Law. The defendants have demanded a trial by jury in this matter, contending that such a trial is available to them as a matter of right by virtue of various statutory provisions (Judiciary Law, § 753-a; Labor Law, § 808), and that a denial of a trial by jury would be unconstitutional. For the reasons stated below, I am of the opinion that a trial by jury is mandated in this instance.

In support of their contention that they have a statutory right to a trial by jury, defendants rely in part upon section 753-a of the Judiciary Law. It is there stated, in clear and unequivocal terms, that: " Notwithstanding any inconsistent provision of law, where the alleged contempt is punishable under section seven hundred fifty and/or section seven hundred fifty-three and arises out of a failure or refusal to obey any mandate of a court contained in or incidental to an injunction order granted by such court in any case involving or growing out of a labor dispute, no punishment, prescribed by either of such sections, shall be meted out except after a trial by jury to which the defendant shall be entitled as a matter of right ". Whether that provision is here applicable depends on three factors: first, is the contempt here punishable under either of the above-mentioned sections; second, did this injunction involve or grow out of a labor dispute; finally, is the punishment sought prescribed by either section. Since the order seeking to place these defendants in criminal contempt is predicated on section 750 of the Judiciary Law, it is axiomatic that the first and third requirements of section 753-a are indeed satisfied in this case. The sole basis for denying a jury trial under this section is to

conclude that the injunction involved did not arise from a labor dispute.[1] The court below has relied upon decisions from lower courts in this State which, while construing other statutes in a different era, have held that there can be no labor dispute within the meaning of particular statutes where public employees are involved. Since it is not disputed that, absent such an interpretation of section 753-a, the court would determine that a labor dispute did in fact exist in this situation, I merely conclude that under section 753-a of the Judiciary Law defendants are given an unqualified right to a trial by jury in this instance, *notwithstanding any inconsistent provisions of law.*

A parallelism is drawn between section 753-a of the Judiciary Law and sections 807 and 808 of the Labor Law in an effort to sustain the contention of the Corporation Counsel that a "labor dispute" cannot exist under the Judiciary Law, when public employees are involved. Sections 807 and 808 of the Labor Law comprise an article in themselves entitled "Injunctions in Labor Disputes". Of these two sections, only 807 has been held not to apply to public employees; the one case purporting to reach that same conclusion under section 808 does so merely by dictum, has never been followed, and was not the source of any significant commentary. (*New York City Tr. Auth.* v. *Loos,* 9 Misc 2d 492.)

Section 807 provides in effect that no injunction or restraining order involved in or growing out of a labor dispute shall be issued until a hearing has been held. This section's predecessor, like the predecessor of section 753-a of the Judiciary Law, was enacted in 1935. Shortly thereafter, the New York Labor Relations Act was enacted. (Labor Law, §§ 700–716.) In that act, the Legislature specifically declared that its provisions were not to apply to either public employees or employees of nonprofitmaking hospitals (Labor Law, § 715). The very year

1. Labor dispute, within the meaning of section 753-a, is defined in that section in the following manner: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee."

that act was enacted, the Appellate Division had before it the case of *Jewish Hosp. of Brooklyn* v. *"John Doe"* (252 App. Div. 581), wherein the sole question was whether the predecessor of section 807 applied to a charitable corporation such as the Jewish Hospital. The court in holding 807 inapplicable began by summarizing the various maxims of construction pertaining to the State and its political subdivisions to show that section 807 might not apply as these entities were not specifically included, despite the statute's encompassing terms. The court proceeded by demonstrating how the legislative purpose behind granting a hearing prior to the issuance of a restraining order had no relation to charitable corporations and their employees. Finally, the court relied upon the provisions in the Labor Relations Act. "Both statutes should be read together and reconciled as far as possible in an effort to read the mind of the Legislature. [Citations omitted.] In enacting both statutes the Legislature recognized labor's right to strike and to resort to peaceful picketing and other lawful activities free from interference by the courts * * * The Labor Relations Act —unlike the instant statute—expressly provides it shall not apply 'to employees of the State * * * or to employees of charitable, educational or religious associations or corporations'" (252 App. Div. 581, 586). This same rationale produced a similar decision in *New York City Tr. Auth.* v. *Loos* (2 Misc 2d 733): "The procedural requirements of section 876-a of the Civil Practice Act [now Labor Law, § 807] have no application to these public employees. Also, the individual defendants plainly have no rights under the State Labor Relations Law for section 715 of the Labor Law specifically provides that such act shall not apply to public employees generally [citations omitted]" (p. 742). Finally, in a recent decision involving the biennial confrontation with the Transport Workers Union, it was stated: "It has been settled that 'public employees' can and should be enjoined from striking and that the provisions of section 807 are not applicable to such employees." (*Manhattan & Bronx Surface Tr. Operating Auth.* v. *Quill*, 48 Misc 2d 1021, 1022.)

Each of these decisions is inapplicable to the present litigation. Each decision recognizes that, where employees are prohibited from striking, it is indeed improvident to require a time-

consuming hearing before a restraining order may be issued against the acknowledged illegal strike. Thus, it is no mere accident that the Legislature, in enacting the Taylor Act, devoted a separate section to the application for injunctive relief. (Civil Service Law, § 211.) This new section not only reflects the holdings of the cases mentioned above but is also compatible with the general purpose of the act—"to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law, § 200.) It does not follow, the cases do not so hold, and the Taylor Act does not so provide, that the public interest is also served by denying public employees the right to a trial by jury. Moreover, before the Taylor Act was adopted, the Legislature, in 1963, made several amendments to the State Labor Relations Law, with the explicit intention of conferring rights upon the employees in nonprofitmaking hospitals. (See, e.g., Labor Law, §§ 715–716.) Thus, the underlying reason for the rule in both *Jewish Hospital* and *Loos* (*supra*) has been overturned by the Legislature, and the decisions have been effectively overruled. It is, therefore, error to declare, as the court below has done, that since the Legislature "must have been aware of the prior judicial interpretation of those sections as not embracing disputes involving public employees, the Legislature may be taken to have acquiesced in that interpretation."[2]

Section 808 of the Labor Law is admittedly similar in language to section 753-a of the Judiciary Law. This marked uniformity between the statutes, when coupled with the decision in *New York City Tr. Auth. v. Loos* (9 Misc 2d 492, *supra*), is said to provide a precedent for the denial of the trial by jury in this case. In *Loos*, the court stated that neither section 808 nor

2. *United States* v. *Mine Workers* (330 U. S. 258), relied upon by the majority in this case involving the Taylor Act, dealt only with the Norris-LaGuardia Act and had no direct bearing on any of the decisions of the New York courts discussed above. As I will indicate later, the Supreme Court's decision was limited in its scope, and clearly failed to consider the question of equal protection of the law. Moreover, the defendants in that case waived the right to an advisory jury (*supra*, p. 268). It is also significant that the one short passage set forth in the majority opinion includes the entire discussion of trial by jury albeit the opinions therein exceeded 120 pages.

section 753-a confers a right to a trial by jury where the "labor dispute" is between public employees and their government. However, in that case, the court concluded that there was no evidence on which the defendant could be adjudged guilty of contempt. Hence, the question of whether a jury trial was required, while discussed by that court, was not instrumental in the court's decision. Moreover, the sole basis for suggesting that there is no statutory basis for a jury trial for a contempt by public employees was the previous decision in *Loos*, which dealt with the necessity of a hearing prior to the issuance of a restraining order (2 Misc 2d 733, *supra*). As the Legislature in 1963 conferred rights upon certain public employees, thereby negating the holding in the first *Loos* decision, it follows that any extension of the *Loos* rationale was also negated. This is confirmed by an analysis of specific provisions of the Taylor Act.

The act begins by reciting that "The Legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees". (Civil Service Law, § 200.) Following a section devoted to the definition of the terms of the act, there are two sections conferring upon the public employee the right to organize and the right to be represented for purposes of collective bargaining "with their public employers". (Civil Service Law, §§ 202, 203.) It is thus abundantly clear that the purpose of the Taylor Act was to enlarge the rights of public employees and to acknowledge the existence of an employer-employee relationship in the area of public employment. It is readily apparent that this new approach to the status of a public employee is totally inapposite to the philosophy prevailing at the time of the *Loos* and *Jewish Hospital of Brooklyn* decisions. It is undisputed that the Taylor Act acknowledges the applicability of the

Judiciary Law when injunctions are to be enforced. "If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law." (Civil Service Law, § 2[3]) It is apparent that this reference to the Judiciary Law was directed to all of article 19. It is also apparent, from all of the above, that the injunction in this case is one "involving or growing out of a labor dispute" within the meaning of section 753-a of the Judiciary Law. The alternative conclusion, adopted today, implies that the Legislature in enacting the Public Employees' Fair Employment Act intended section 753-a of the Judiciary Law to apply to that act, except where public employees are involved.

The Taylor Law, through its reference to the Judiciary Law, clearly intended that public employees and their representatives should have the right to a trial by jury in the present situation. Just as the amendments to the Labor Relations Law evidence an intent to increase the rights of employees in charitable hospitals, the purpose of the Taylor Act, as expressed therein, demonstrates an enlightened approach toward employer-employee relations in this area. Here, as in *Jewish Hosp. of Brooklyn* v. *"John Doe"* (252 App. Div. 581, 586, *supra*), "Both statutes should be read together and reconciled as far as possible in an effort to read the mind of the Legislature."

The majority proffers many reasons why a jury trial may not be appropriate or desirable in this case. Thus, referring in part to the legislative history of an act since repealed, we are told that a jury trial might precipitate "the destruction of a whole city", "endanger the safety of millions", and "produce an epidemic". I do not comprehend how the mere presence of a jury in a criminal contempt case can cause such disaster. However, the reasons advanced by the majority do serve to

3. While section 211 merely refers to section 750 of the Judiciary Law, the Corporation Counsel concedes that subsequent sections were also intended to apply. As the majority quite properly indicates, the order in this case is sought under sections 750 and 751 of the Judiciary Law. It would indeed be overly simplistic reasoning on our part if we were to hold that reference to section 750 meant sections 750 and 751 only, but not sections 750, 751 and 753-a.

bring to mind the knowledgeable words of Mr. Justice HOLMES: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." (*Northern Securities Co.* v. *United States,* 193 U. S. 197, 400.)

Were this case to involve simply a question of statutory construction, it would be unnecessary to go beyond the analysis of the statutory provisions already discussed, since that analysis fairly compels the conclusion that those statutes provide for a jury trial of a criminal contempt alleged to have been committed by public employee unions and their officers. But, an additional issue is raised by the contrary construction of those statutes. The issue is of a constitutional dimension since it involves a purported statutory discrimination between public and private employees in relation to their respective rights to such a jury trial. Initially, it should be emphasized that public employees, qua public employees, are not to be regarded as inhabitants of a constitutional limbo in which they are relegated to a "watered-down version of constitutional rights." (*Garrity* v. *New Jersey,* 385 U. S. 493, 500; *Keyishian* v. *Board of Regents,* 385 U. S. 589.) Furthermore, this proposition remains true even in the face of the dire perils of strikes by public employees. A teacher no more forfeits his constitutional rights when it is alleged that he is engaged in an illegal strike than does any individual citizen forfeit them when it is alleged that he has committed some heinous crime. We harbor no doubts as to the very serious character of the threat to the public inherent in strikes by public employees. It is precisely in times when the public interest is so seriously threatened that courts must heed the caution voiced by Chief Judge CARDOZO: "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' * * * are not to change their form and content in response to the 'hydraulic pressure' * * *, exerted by great causes." (*Matter of Doyle,* 257 N. Y. 244, 268, quoting HOLMES, J., in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.) Suffice it to say that the issue here is whether the

defendants have a statutory right to a jury trial and the major consideration in arriving at a negative conclusion on that issue is the constitutional infirmity of such a conclusion and the emphasis on the perils of public employee strikes merely serves to becloud the true issue to be resolved here.

Both the United States (14th Amdt.) and the New York State Constitutions (art. I, § 11) provide that no person shall be deprived of the equal protection of the law. Cases too numerous for citation have applied this constitutional mandate in a wide variety of situations and the United States Supreme Court has succinctly stated the applicable criteria: "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended *only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective* * * * A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland*, 366 U. S. 420, 425–426; emphasis added.) The emphasized portion of that opinion succinctly states the constitutional infirmity flowing from the majority's construction of the statutes so as to deny defendants a right to trial by jury. Although it is true, as the majority states (p. 116), "that a legitimate distinction between public and private employment is constitutionally permissible", it must be borne in mind that a classification which is constitutionally impeccable for one purpose may be constitutionally infirm for another (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150). Thus, a classification of unions and their members in terms of their employment in the public, as against the private, sector may well be reasonably related to a legislative objective of prohibiting strikes which interfere with essential public services. We are here faced, however, not with legislation barring strikes by public employees, but with legislation which, *as construed*, denies a jury trial in a criminal contempt proceeding against public employees arising from the alleged violation of a court order issued in a labor dispute with a governmental employer, but which grants such a jury trial to employees in the private sector who are also charged with violating a court order. Each is charged with the same violation and the fact

that one is employed by the Board of Education, while the other is employed by some private educational system or institution, has no bearing whatever on the procedural method by which his accountability for the alleged violation is to be determined. Is there any governmental interest which requires that the Board of Education employee have his guilt or innocence determined by a Judge without a jury, whereas the employee of the private educational system or institution may have his guilt or innocence determined by a jury? No such interest has been demonstrated in this case and characterizations of the jury-trial process as "long" and "drawn-out" cannot serve to supply such an interest.[4] Furthermore, in terms of the time and circumstances within which it is insisted this legislation must be viewed, it is clear that this is a time when the right to a jury trial is increasingly being recognized as being "fundamental to the American scheme of justice" (*Duncan* v. *Louisiana*, 391 U. S. 145, 149). In view of this, is it reasonable to ascribe to the Legislature an intent to sacrifice such a fundamental aspect of our system of justice to the demands of expedience? So, too, the circumstances of the recent history of public employer-employee labor relations would seem to indicate that the legislators, as practical, realistic men, realized that the very resort to the court and its process in such situations often tends to exacerbate and inflame an already critical situation and has even, in the recent past, itself become a key obstacle to the resolution of such disputes and the re-establishment of the sought-after harmony and co-operation between public employers and their employees. In the face of these facts, is it reasonable to say that the Legislature could reasonably have concluded that the withholding of a right so universally recognized as an integral part of our system of administering justice would *hasten* the end of such public employee labor disputes? The time and the circumstances provide a rather clear-cut answer to that question. The conclusion is inescapable that, in the language of *McGowan* (*supra*), the distinction between public and private employees, in the context of the right to jury trial, is "wholly irrelevant" to the

4. Indeed, at least as to the fine which may be imposed, the Legislature disclaimed any overwhelming desire for swift punishment by providing that it need not be paid until an "appeal is finally determined." (Judiciary Law, § 751, subd. 2, par. [d], cl. [i].)

achievement of the legislative objectives expressed in the Taylor Act. (Cf. the equal protection analysis in *Baxstrom* v. *Herold*, 383 U. S. 107, 111–112.) Indeed, the legislative objectives sought to be achieved by the enactment of the Taylor Act are not difficult to establish since the Legislature saw fit to verbalize its objectives in the statute itself: "The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act *to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of the government.*" (Civil Service Law, § 200; emphasis added.) It is difficult, if not impossible, to conceive of any way in which the *denial* of a jury trial, in a criminal contempt proceeding brought against a public employees' union and its officers and arising from a dispute with a governmental employer, is in any way relevant to or productive of harmony and co-operation or how it could possibly be relevant to the assurance of the orderly and uninterrupted operations and functions of the government. The issue involved goes merely to the *procedure* to be invoked when a labor dispute has already occurred and has resulted in a court order which has allegedly been violated and simply has no bearing whatever on the effectuation or frustration of the expressed legislative objectives. This is particularly apparent when it is recognized that the matter of jury trial arises only *after* events have occurred which necessitate a resort to the court and its mandates in an effort to enforce compliance which has allegedly not been voluntarily forthcoming. Nor is it conceivable that the *denial* of such a right, especially when it is *granted* in criminal contempt proceedings arising from private labor disputes, could effectuate the objectives of harmony and co-operation and uninterrupted government operations in the future. Governmental entities can show no vital or even non-vital interest which will be served by denying these defendants a jury trial. In the face of the obvious lack of relevant connection between the public-private employee distinction as to the right to a jury trial and the objectives sought to be achieved by the legislation of which the denial of a right to jury trial is purportedly a part, there is a rather clear-cut deprivation of the equal protection of the law to which *both* public and private

employees are entitled. It should need no citation of case or treatise to establish the proposition that a particular enactment, at the time it is challenged, either meets or does not meet the requirements of the fundamental document under which it must find its ultimate validity. Either the statutes involved in this case, *as construed*, accord public employees the equal protection of the law or they deprive public employees of such equal protection.

In light of the serious constitutional deprivation of equal protection involved in the majority's construction of these statutes, it is difficult to understand why some rather fundamental canons of statutory construction were apparently ignored in arriving at that construction. While we recognize that the "primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature", we also recognize that "A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 147; *Matter of Meyer*, 209 N. Y. 386.) The mere comparison of the respective rights of the public and private employee resulting from the majority's construction amply demonstrates that this canon played no part in that construction. Even more critically in point is the canon which asserts that "statutes must be construed to avoid not only the conclusion that they are unconstitutional, but also to avoid any grave doubts upon that score." (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 150; *Courtesy Sandwich Shop* v. *Port of N. Y. Auth.*, 12 N Y 2d 379, 389; *Matter of Coates*, 9 N Y 2d 242, 253; *Matter of Vanderbilt*, 281 N. Y. 297, 313.) Even assuming, *arguendo*, that the majority's construction of the statutes so as to deny the public employee the right to a jury trial of a criminal contempt is supportable simply as a matter of construction, the resulting constitutional infirmity of that construction requires that the court implement these canons to obviate those infirmities. It is axiomatic that the Judiciary should take great care in ascribing a particular intent to the Legislature in enacting a particular statute. It is equally axiomatic that such care should be redoubled when the intent sought to be ascribed to the Legislature carries with it a burden of unconstitutionality. The lack of such care is

acutely apparent here since there is available to the court a construction which is eminently reasonable, if not compelled, as well as free from constitutional objections.

Since we find that the defendants are entitled to a jury trial under the statutes of this State and since a contrary construction of those statutes raises a grave constitutional question as to the deprivation of the equal protection of the law, we would reverse the orders of the Appellate Division which affirmed the denial of appellants' right to a jury trial.

Accordingly, the orders of the Appellate Division should be reversed and the certified questions should be answered in the affirmative.

KEATING, J. (dissenting). Although I concur in most of Judge BURKE's opinion and would construe the Taylor Law as granting a right to trial by jury here in order to avoid reaching a serious constitutional question (*Kent* v. *Dulles*, 357 U. S. 116), I prefer to rest my dissent primarily on the constitutional mandate involved. In light of the majority's treatment of this point, I find it desirable to outline briefly the basis of my conclusion that, even if the Taylor Law does not provide a right to trial by jury to the appellants, the "equal protection" clause of the Fourteenth Amendment does.

The "equal protection" clause stands as a guardian and protector of minorities of every kind against every form of irrational discrimination. It is manifestly far easier, politically, to pass legislation which touches adversely only a small group. The "equal protection" clause seeks to control this tendency by requiring the Legislature to extend its classification to all persons or groups fairly within the legislative policy. Justice JACKSON in his concurring opinion in *Railway Express* v. *New York* (336 U. S. 106, 112-113) recognized this fundamental purpose of the "equal protection" clause when he wrote: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation

and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

Later on in the opinion he summarized his views in a particularly apt phrase: "[W]e are much more likely to find arbitrariness in the regulation of the few than of the many" (336 U. S., p. 113). I would examine the issue raised by this appeal in light of Justice JACKSON's analysis of the "equal protection" clause.

In the case upon which the majority rely (*United States* v. *Mine Workers*, 330 U. S. 258, 298), the "equal protection" point was not even raised. Moreover, the case was decided in a day when the importance of the "equal protection" clause, as a vital tool in the preservation of a just society, was only then beginning to be felt.

The question is not whether public employees differ from private employees or whether the former may not strike, while the latter may, but whether the differences between them are pertinent to the subject with respect to which the classification is made, to wit, the right to trial by jury (*Baxstrom* v. *Herold*, 383 U. S. 107, 111). More precisely, the issue here is whether the denial of a jury trial is necessary to the functioning of the Taylor Law. The "one vital reason" offered by the majority to justify the lack of a jury trial requirement, where public employees or their representative organizations are involved, is an alleged need for "Prompt determinations" "in criminal contempt proceedings under the Taylor Law" "unencumbered by the long, drawn-out procedures involved in jury trials" "in order to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders." (Majority opn., p. 117.) In contrast to almost every other criminal statute, however, the Taylor Law postpones the enforcement of all of its penalties against the union until after all appeals are exhausted (Judiciary Law, § 751, subd. 2, par. [d], cl. [i]). While it is conceivable that the appellate process could terminate prior to the end of the strike, this has yet to happen. Therefore, in the case of the union, the purported justification for denying a jury trial has no application at all.

In the case of the short jail terms provided by the statute as punishment against union leaders, and which can be imposed immediately, it is of crucial significance that, in three major strikes against the City of New York since the Taylor Law

was enacted, the city found it impossible effectively to enforce the short jail sanction to end the strikes.* The same situation prevailed for 20 years under the Condon-Wadlin Act (L. 1947, ch. 391). Therefore, while the Legislature has the right to experiment, we are here dealing with a situation where the reasons offered for drawing the distinction have been shown by historical precedent to have no basis.

When it is remembered that employees of private utilities have the power to plunge one of the great cities of the world into total darkness or complete silence, that employees of privately owned railroads and shipping lines have the power to deprive the residents of that city of vital food and fuel, that private sanitation workers, who carry away a substantial portion of the refuse in New York City, have the power to endanger the health of millions of its inhabitants and that thousands of other workers, carrying out activities vital to the life and safety of the city, may demand a trial by jury if they are charged with violation of a court order restraining a strike, the fallacy in the reasoning which would deny a jury trial to these defendants is readily exposed. References to the dangers to the children from the teachers' strike, real as those dangers may be, are not a substitute for a penetrating analysis of the labels "public" and "private" employees. In my view, the "public"-"private" distinction cannot be maintained as a constitutionally viable difference with respect to the right of a jury trial.

Judges SCILEPPI, BREITEL and JASEN concur with Chief Judge FULD; Judge BURKE dissents and votes to reverse in an opinion in which Judges BERGAN and KEATING concur, Judge KEATING in a separate opinion in which Judges BURKE and BERGAN also concur.

Orders affirmed, etc.

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* The majority opinion argues (n. 2) that in a recent strike in the public sector a union leader was imprisoned for contempt during the course of the strike. What the argument overlooks is that the lack of a jury trial did not speed the end of the strike for in that case as well as others the strikes continued.

Appendix C

(Remittitur of New York Court of Appeals)

No. 410 Form 6

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of November in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,

The Hon. Stanley H. Fuld,
Chief Judge, *Presiding*.

Raymond J. Cannon, *Clerk*.

Remittitur November 21, 1968.

1. No. 410. 68

The City of New York,

Respondent,

vs.

John J. DeLury, Individually &c., & ors., &c.,

Appellants.

Be it Remembered, That on the 23rd day of August in the year of our Lord one thousand nine hundred and

sixty-eight, John J. DeLury, Individually &c., & ors, &c., the appellants in this cause, came here unto the Court of Appeals, by O'Dwyer & Bernstien, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Messrs. Paul O'Dwyer and John J. DeLury, Jr., of counsel for the appellants, and by Mr. Frederic S. Nathan, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. Question certified answered in the affirmative.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs. Question certified answered in the affirmative, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, and by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 21, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

Appendix C-1

(Order of New York Court of Appeals
Re: Remittitur)

State of New York,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals in the City of Albany on the Eleventh day of December A.D. 1968.

Present:

Hon. Stanley H. Fuld,
Chief Judge, presiding

1

Mo. No. 1265

The City of New York,

Respondent,

vs.

John J. DeLury, Individually &c., & ors., &c.,

Appellants.

An application to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said application be and the same hereby is denied for the reason that the opinion of the Court clearly indicates that the constitutional arguments raised by the appellants were passed upon (*Miller* v. *Miller*, 22 N.Y. 2d 722).

A copy.

S E A L

/s/ Gearon Kimball
Deputy Clerk

Appendix D

(Opinions of New York Supreme Court, Special Term)

Opinion on Conviction of DeLury by Justice Streit

The Court: The statute is very clear and explicit, government employees may not strike against the government. It is also clear, so far as this Court is concerned, and so far as the evidence is concerned, that there was a strike called on the morning of February 2, 1968.

The evidence is also overwhelming that the strike is still in progress. It is devastating strike. It could be very destructive. There is no question about the fact that the union is guilty of violating the Taylor Law.

The question arises now as to whether the defendant DeLury is guilty of contempt, criminal contempt of court, within the meaning of Section 751 of the Judiciary Law.

There is some evidence to the effect that on the morning of February 2nd he made a statement which says, "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes. (cheers) All opposed (boos). I didn't come here to bargain. I took a firm position with the City. I gave the members a final offer of this union. Now I want to show discipline here this morning, or this afternoon. I don't want to show where there is confusion in the members. You got a job at the locations to see that is effective 100 per cent. (cheers)"

This is conceded, though objected to.

Following that, we have the order of Mr. Justice Spiegel on the evening of February 2nd. It is conceded that the defendant DeLury was aware of the order of this Court; and the order directed him, DeLury, an officer and president of the Association, to instruct all members of said Association not to engage in any strike, concerted stoppage of work, or concerted slowdown against the plaintiff.

Appendix D

It is also conceded, and the defendant has indicated that it is unnecessary to come forward with proof by members of the Association, that they did not receive such an instruction.

It is conceded that he did not comply with this order to instruct the members of the Association not to engage in any strike, concerted stoppage of work, or concerted slowdown against the plaintiff.

For whatever influence the president of an association may have, it is his duty to comply with the Court's order when a Court instructs him to tell his men to cease the stoppage. This he has declined to do, and I hold that the evidence shows, beyond a reasonable doubt, that the defendant DeLury is guilty of a wilful contempt of this Court within the meaning of Section 751 of the Judiciary Law. * * * The defendant John DeLury is fined the sum of $250 and sentenced to jail for a period of fifteen days for his wilful disobedience of the Court's mandate."

Opinion on Conviction of Union by Justice Streit

The Court: On Friday, February 2, 1968, Mr. Justice Spiegel signed an order directing the officers and members of the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters, to refrain from engaging or causing or instigating any strike, concerted stoppage of work; from meeting or taking any action likely to cause any employees to desist from engaging in the performance of their duties; from agreeing, conspiring or combining to perform any acts tending to interfere with the operation of the Department of Sanitation of the City of New York, and the defendant officers of the Uniformed Sanitationmen's Association were directed to instruct all members of said association not to engage in any strike, concerted stoppage of work or concerted slowdown against the plaintiff.

The motion for a temporary injunction was returnable before me on February 5. At 5 p.m. on February 2, coun-

sel accepted service on behalf of the union and its officers. On February 5, the motion for a preliminary injunction was argued before me. It was then conceded that there was a work stoppage by 99 per cent of the 4500 employees who were scheduled to report for duty but failed to appear from 7 a.m. on February 2 until 12:20 p.m. on February 5.

On that morning, I granted a preliminary injunction restraining the union, and its officers, from striking. That same day, Justice Irving Levey signed an order to show cause seeking to punish the union for violation of Judge Spiegel's order of February 2, returnable before me on February 6. I signed an order seeking to punish the officers for violating Judge Spiegel's order, also returnable on February 6. Both of these motions were consolidated. I held a hearing, and after listening to the testimony of Maurice Feldman, the Acting Commissioner of Sanitation; Mr. Jack Bigel, a consultant to the Uniformed Sanitationmen's Association; Dr. Edward O'Rourke, the Commissioner of Health; Inspector Edmond Joyce of the New York Police Department, and Fire Chief John T. O'Hagan; and after a concession that Mr. DeLury did not comply with the order of this Court dated February 2, 1968 to instruct the members of the Association not to engage in any strike or concerted work stoppage, I held Mr. DeLury guilty of criminal contempt and imposed sentence upon him.

On February 7 we continued the hearing to punish the union for violation of Judge Spiegel's order. After hearing Mr. Feldman and Mr. Nathansky, a senior accountant in the Comptroller's Office, we recessed.

On February 8, Justice Irving Levey signed an order, returnable before me on February 9, to show cause why the union should not be punished for violation of my preliminary injunction dated February 5 restraining it from engaging in, causing, instigating, condoning and lending assistance to a strike against the City of New York.

Today the Corporation Counsel has moved to consolidate the two applications: one, for violation of Judge

Spiegel's order dated February 2; and, two, for violation of my order dated February 5 not to engage in any strike. I granted that motion.

The specific charge against the union is that it is guilty of criminal contempt within the meaning of Sections 750 and 751 of the Judiciary Law and Article 14 of the Civil Service Law, in that it failed to comply with the restraining order of February 2 and the temporary injunction of February 5 to refrain from engaging in, causing, instigating or lending support or assistance of any nature to any strike or concerted stoppage of work.

Section 210 of the Civil Service Law is short, clear and concise. It simply says: "No public employee or employee organization shall engage in a strike." Section 201, Subdivision 10, of that law defines it even more simply. It reads: "The term 'strike' means any strike or other concerted stoppage of work or slowdown by public employees."

It is conceded that 99 per cent of the employees, members of the Uniformed Sanitationmen's Association, Local 831, failed to report for duty for the days of February 3, February 4 and February 5. The testimony shows a few hundred appeared on February 7, but that practically no one appeared for work on February 6, 8, 9 or 10 until 8:15 p.m. on the 10th.

It is also conceded that this was a work stoppage. This mass work stoppage was concerted; and I shall not dignify the specious argument that it required preliminary or subsequent action or approval of any of the officers.

As a defense to these charges of criminal contempt for violation of the lawful Court orders and mandates not to strike, the defendant contends, as I understand it, that the City representative, in his negotiations, refused to consider the formula as presented by the witness, Jack Bigel. The defendant further asserts that the City, during all the discussions, insisted on using the formula as it applied to the policemen and firemen, but refused to consider Mr. Bigel's presentation concerning increased production.

Moreover, says the defendant, the City did not take into consideration the increased number of accidents in the Sanitation Department. It also points to the number of conferences that took place between February 2 and February 10 while the union was on strike.

Now, I fail to see how this testimony in any way justifies a willful defiance of Court orders. The statute, Section 751, Subdivision 2(a) does provide that in fixing the amount of the fine and/or the duration of the forfeiture, the Court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to, the extent of the willful defiance, the impact of the strike on the public health, the refusal of the public employer to submit to the mediation and fact-finding procedure provided in Section 209 and whether, if so alleged by the employee organization, the public employer engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike.

Whether we consider Section 751 of the Judiciary Law or Section 210 of the Civil Service Law or whether we consider Local Law 53, as passed by the City Council and the Board of Estimate, effective September 1, 1967, I do not find a scintilla of evidence from which I can infer that the City engaged in any acts of extreme provocation, nor that the union made any efforts to terminate the strike in good faith. Holding negotiations while a willful defiant strike is in progress does not indicate actions in good faith to terminate the strike. On the contrary, I find a willful defiance and resistance of the Court's mandates. I find, also, that the impact of the strike on the public health, safety and welfare of the eight million people of the City of New York was the most severe, most dangerous and, almost, the most disastrous in the history of the City of New York.

Appendix D

I decide and hold now, at the conclusion of the consolidated motions, after a hearing, that the evidence shows beyond a shadow of doubt that the union is guilty of criminal contempt within the meaning of the Judiciary Law and the Civil Service Law and Local Law 53.

A great deal has been said and written by former Presidents of the United States, and former Governors of this State, and students of government concerning the effect of a strike by government employees against the government. To expound and philosophize on this subject at this moment would be a supererogation. But after 31 years on this Bench, it is appropriate that I make a few observations.

It has been a fundamental principle of government that a public employee may not strike against the government. If there were no Condon-Wadlin Act, if there were no Taylor Act, then the common law against such strikes would still apply.

To quote the late Justice Robert Jackson of the United States Supreme Court, "This case presents one of the best examples of one of the worst menaces to American justice." But of far greater significance to this Court and the cause of justice and the violation of this statute, which the Legislature enacted for the benefit of the State and the employees only last year, is the willful and deliberate defiance of the lawful mandates of this Court. If there is one thing that the people are entitled to expect from the civil service employee, to whom it gives life tenure, vacations, sick leave, contributes to his pensions, and the right to bargain collectively, it is respect for the law. In my opinion, our form of government cannot long endure when any group or class of persons are permitted to decide with which laws they shall comply and which they shall flout. More particularly, when the times comes that public employees can strike against the government with impunity, then that is the end of our democracy and the beginning of anarchy.

Appendix D

As was pointed out to me the other day by a prominent lawyer at our conference—his name is Paul O'Dwyer—we each have a duty to perform. And this might be a good occasion to demonstrate the fortitude of the judiciary.

I find that the union has willfully, deliberately and recklessly defied and violated the lawful mandates of this Court, in utter disregard of the health and welfare of the eight million residents of the City of New York. I find, and hold, that the City of New York has adopted Local Law 53 pursuant to Section 212 of the Civil Service Law. This law created the Office of Collective Bargaining in the City of New York, thus exempting the City from the provisions of the Taylor Law concerning the dues check-off, which otherwise would be in the purview of the State Employment Relations Board. Hence, the Court has the power to order a forfeiture of the rights granted pursuant to the provisions of Paragraph (b) of Section 208 of the Civil Service Law.

It is the judgment of this Court that the union be, and it is hereby fined the sum of $80,000; and I hereby decree and direct that this union has forfeited its right to membership dues collections for a period of 18 months and the City is directed accordingly. The motions to dismiss and for judgment are denied.

Appendix E

(New York Laws Involved)

A. New York Constitution, Art. I, § 2

[Trial by jury; how waived.] § 2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

B. New York Civil Service Law, Art. 14

* * *

§ 200. Statement of policy.

The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political

subdivisions to negotiate with, and enter into written agreements with employees organizations representing public employees which have been certified or recognized, (c) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (d) continuing the prohibition against strikes by public employees and providing remedies for violation of such prohibition.

§ 201. DEFINITIONS.

* * *

7. The term "government" or "public employer" means (a) the state of New York, (b) a county, city, town, village or any other political subdivision or civil division of the state, (c) a school district or any governmental entity operating a public school, college or university, (d) a public improvement or special district, (e) a public authority, commission, or public benefit corporation, or (f) any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state.

8. The term "public employee" means any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include persons holding positions by appointment or employment in the organized militia of the state for purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article.

* * *

10. The term "strike" means any strike or other concerted stoppage of work or slowdown by public employees.

* * *

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§ 202. RIGHT OF ORGANIZATION.

Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

§ 203. RIGHT OF REPRESENTATION.

Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

§ 204. RECOGNITION AND CERTIFICATION OF EMPLOYEE ORGANIZATIONS.

1. Public employers are hereby empowered to recognize employee organizations for the purpose of negotiating collectively in the determination of, and administration of grievances arising under, the terms and conditions of employment of their public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

2. Where an employee organization has been certified or recognized pursuant to the provisions of this article, the appropriate public employer shall be, and hereby is, required to negotiate collectively with such employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees as provided in this article, and to negotiate and enter into written agreements with such employee organizations in determining such terms and conditions of employment.

* * *

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§ 207. DETERMINATION OF REPRESENTATION STATUS.

For purposes of resolving disputes concerning representation status, pursuant to section two hundred five or two hundred six of this article, the board or government, as the case may be, shall

* * *

3. Certify or recognize an employee organization upon the affirmation by such organization that it does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.

§ 208. RIGHTS ACCOMPANYING CERTIFICATION OR RECOGNITION.

A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

(a) to represent the employees in negotiations and in the settlement of grievances;

(b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees; and

(c) to unchallenged representation status until the next succeeding budget submission date and, thereafter, for an additional period of either twelve months or, if the parties so agree, not less than twelve months nor more than twenty-four months, which period shall commence one hundred twenty days prior to such next succeeding budget submission date.

* * *

Appendix E

§ 210. Prohibition of strikes.

1. No public employee or employee organization shall engage in a strike, and no employee organization shall cause, instigate, encourage, or condone a strike.

2. A public employee who violates the provisions of subdivision one of this section shall be subject to the disciplinary penalties provided by law for misconduct, in accordance with procedures established by law.

* * *

§ 211. Application for injunctive relief.

Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law.

§ 212. Local government procedures.

This article, except section two hundred one, section two hundred two, two hundred three, two hundred four,

paragraph (b) of subdivision three of section two hundred seven, section two hundred eight, subdivisions one and two of section two hundred ten, and section two hundred eleven, shall be inapplicable to any government (other than the state or a state public authority) which, acting through its legislative body, has adopted by local law, ordinance or resolution, its own provisions and procedures which have been submitted to the board by such government and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent to the provisions and procedures set forth in this article with respect to the state; provided that with respect to the city of New York, such provisions and procedures need not be related to budget submission dates; and provided further, that with respect to provisions and procedures adopted by local law by the city of New York no such submission to or determination by the board shall be required, but such provisions and procedures shall be of full force and effect unless and until such provisions and procedures, or the continuing implementation thereof, are found by a court of competent jurisdiction, in an action brought by the board in the county of New York for a declaratory judgment, not to be substantially equivalent to the provisions and procedures set forth in this article.

C. New York. Judiciary Law

§ 751. PUNISHMENT FOR CRIMINAL CONTEMPTS.

1. Except as provided in subdivision (2), punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the

discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.

2. (a) Where an employee organization, as defined in section two hundred one of the civil service law, wilfully disobeys a lawful mandate of a court of record, or wilfully offers resistance to such lawful mandate, in a case involving or growing out of a strike in violation of subdivision one of section two hundred ten of the civil service law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court in an amount equal to one fifty-second (1/52) of the total amount of annual membership dues of such employee organization or ten thousand dollars whichever is the lesser; provided, however, that where an amount equal to one fifty-second part (1/52) of the total amount of annual membership dues of such employee organization is less than one thousand dollars, such fine may be fixed in the sum of one thousand dollars. In the case of a government exempt from certain provisions of article fourteen of the civil service law, pursuant to section two hundred twelve of such law, the court may, as an additional punishment for such contempt, order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of section two hundred eight of such law, for a specified period of time, as the court shall determine, but in no event to exceed eighteen months; provided, however, that weher a fine imposed

pursuant to this subdivision remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, such forfeiture shall be suspended to the extent necessary for the unpaid portion of such fine to be accumulated by the public employer and transmitted to the court. In fixing the amount of the fine and/or duration of the forfeiture, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (i) the extent of the wilful defiance of or resistance to the court's mandate (ii) the impact of the strike on the public health, safety, or welfare of the community and (iii) the ability of the employee organization to pay the fine imposed; and the court may consider (i) the refusal of the employee organization or the appropriate public employer, as defined in section two hundred one of the civil srevice law, or the representatives thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine of the civil service law and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike.

(b) In the event membership dues are collected by the public employer as provided in paragraph (b) of section two hundred eight of the civil service law, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(c) The term "total amount of annual membership dues of the employee organization" as used in paragraph (a) of this subdivision, shall include initiation fees, periodic dues, and all assessments collected by such employee organization in the twelve-month period preceding the contempt attributable to the members of such employee or-

ganization in that part of the collective negotiation unit actually on strike; provided, however, that if such strike effectively prevents the functioning of the entire collective negotiation unit or units represented by such employee organization, it shall mean such fees, dues and assessments attributable to the total number of members of the employee organization in such unit or units.

(d) (i) An employee organization appealing an adjudication and fine for criminal contempt imposed pursuant to subdivision two of this section, shall not be required to pay such fine until such appeal is finally determined.

(ii) The court to which such an appeal is taken shall, on motion of any party thereto, grant a preference in the hearing thereof.

* * *

§ 753-a. CONTEMPTS IN CASES INVOLVING OR GROWING OUT OF LABOR DISPUTES

1. Notwithstanding any inconsistent provision of law, where the alleged contempt is punishable under section seven hundred fifty and/or section seven hundred fifty-three and arises out of any failure or refusal to obey any mandate of a court contained in or incidental to an injunction order granted by such court in any case involving or growing out of a labor dispute, no punishment, prescribed by either of such sections, shall be meted out except after a trial by jury to which the defendant shall be entitled as a matter of right; provided, however, that this section shall not apply to any alleged contempt of such an injunction order committed in the presence of the court.

2. As used in this section and in subdivision three of section 215.50 of the penal law:

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(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employees or associations of employers; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involve any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

(c) A person or association shall be held to a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

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D. New York Labor Law

§ 807 * * *

* * *

6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

* * *

10. When used in this section, and for the purpose of this section: (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation, or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or association of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.

§ 808. CONTEMPT OF INJUNCTION ORDER TO BE TRIED BY JURY

1. Notwithstanding any other provision of law, no person shall be punished either by fine or imprisonment for any alleged contempt arising out of any failure or refusal to obey any mandate of the court contained in or incidental to an injunction order granted by said court in any case involving or growing out of a labor dispute except after a trial by jury to which the defendant shall be entitled as a matter of right; provided, however, that this section shall not apply to any alleged contempt of such an injunction order committed in the presence of the court.

2. As used in subdivision one of this section:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation;

or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined);

(b) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee;

(c) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1029

JOHN J. DELURY, Individually and as President, JOHN J. CONROY, Individually and as Treasurer, etc., of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, etc.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

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Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

The appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that some of the questions presented were not raised in the courts below and all of them are so unsubstantial as not to need further argument.

Statement of the Case

An action for a permanent injunction to restrain the Uniform Sanitationmen's Association (the Union) and its officers and members from engaging in a strike, or instigating or encouraging a strike, was instituted in Supreme Court, New York County, on February 2, 1968. Ancillary to this action, an application for a preliminary injunction was made by order to show cause issued the same day. The order to show cause contained a temporary restraining order in the identical terms of the ultimate relief sought, coupled with a direction to the officers of the Union to instruct its members not to engage in any strike against the City of New York.

The motion for a preliminary injunction was granted and an order was entered thereon on February 5, 1968, in the same terms as those of the temporary restraining order.

Motions were made to punish the Union and certain of its officers, including its president, appellant DeLury, for criminal contempt of court based upon their wilful disobedience to the injunction provisions contained in the temporary restraining order and the preliminary injunction order. The contempt proceedings were consolidated and tried without a jury (none was demanded) commencing on February 6th. They resulted in the convictions of DeLury and the Union which are the subject of this appeal.

The convictions were unanimously affirmed without opinion by the Appellate Division of the Supreme Court (30 A D 2d 781). The order of the Appellate Division was

unanimously affirmed by the New York Court of Appeals, three of the judges concurring insofar as the right to a jury trial was concerned (23 N Y 2d 175), on constraint of the Court of Appeals' decision in *Rankin* v. *Shanker*, 23 N Y 2d 111 (Appenidx B to Juris. Statement).

The Strike:

In January, 1968, a panel of mediators was appointed with the agreement of the City and the Union in an effort to culminate negotiations for the renewal of a collective bargaining agreement. By January 31st the panel had formulated a proposal for settlement which was acceptable to the City, but was rejected by the Union stewards (205),* who, thereupon, called for a demonstration in front of City Hall at 7:00 A.M. on Friday, February 2nd (41). This demonstration took place as scheduled and signalled the beginning of a nine day strike.

At 7:00 A.M. on February 2, 1968, some 4,500 sanitationmen were scheduled to report for duty. It is a conceded fact that 99% of them, without excuse, failed to report (75). They gathered, instead, in City Hall Park to demonstrate their determination not to work unless their demands were met. They were addressed by their president, John J. DeLury, in the following language, the authenticity of which is not challenged (Pl. Ex. 1, 85-86):

> "Your sentiments before was go-go-go. I'd accept a motion for go-go-go (cheers). All in favor signify by saying yes (cheers). All opposed (boos). I didn't come here to bargain, I took a firm position with the City, I gave the members a final offer of this union.

* Numbers in parentheses refer to pages in the Record on Appeal.

> Now I want to show discipline here this morning—or this afternoon—I don't want to show where there is confusion in the members—You got a job at the locations to see that this is effective 100% (cheers)."

Thereafter, virtually none of the sanitationmen reported for duty until the termination of the strike at 8:00 P.M. on February 10th (87, 88, 131, 156, 157), except that, on February 7th, some 500 volunteers collected hospital refuse (133).

Garbage, which accumulated in the streets of the City at the rate of 10,000 tons a day (89), was characterized by the Commissioner of Health as a serious health threat (101), and by the Chief of the Fire Department as the cause of a serious increase in the incidence of fires (108).

The Contempt:

Upon the commencement of the strike on February 2nd, appellee obtained a temporary restraining order which was served upon the attorneys for the appellants shortly before 5:00 P.M. These facts were immediately communicated to the officers of defendant Union who were attending a meeting at the Downtown Athletic Club (187).

Despite the clear mandate of the injunction and the direction to the Union officers to instruct the members not engage in a strike, compliance was neither effected nor attempted. On the contrary, appellants stipulated that if particular sanitationmen were called, "they would testify that they did not receive any instructions from Mr. DeLury to go back" (110). As the Court of Appeals pointed out, the City was ready to call ten witnesses (23 NY 2d 175,

181, note 4). The plan was to issue 100 subpoenas to employees selected at random. Jack Bigel, the Union's "consultant", who spent as many as 22 hours a day with DeLury during the strike (92), testified that after the first injunction order, DeLury did not give any instructions in his presence to any Union member with respect to engaging in any strike and that he had no knowledge of Mr. DeLury asking anybody else to give any such instructions in his behalf (94).

Appellants' claim (Juris. Statement, pp. 9, 30) that the other individual defendants were acquitted on the identical evidence offered as to DeLury, is false. Neither the incriminating stipulation nor the Bigel testimony named any other officer in relation to any evidence of contempt.

DeLury suggests that it is somehow wrong to punish him for failing to comply with the court orders directing the Union officers to instruct all Union members to return to work because he did not have it within his power to do so (Juris. Statement, p. 28). The fallacy in this argument is that DeLury could have complied with the court order by giving the required instruction in good faith regardless of whether he had the power to secure compliance.

The further statement that the record demonstrates that DeLury counseled against strike action (Juris. Statement, p. 28) is not supported by any reference to the record or by the record itself.

The wilful concerted action of the Union in manifest disobedience to the two orders was shown, among other things, by the unexcused absence of virtually 100% of its membership for eight days after the issuance of the injunc-

tion. The Union produced nothing to justify their refusal to obey the Court's orders. The only evidence adduced related to alleged extreme provocation of the strike, which, under the governing statute, could have been considered only in mitigating the penalties against the Union.

Conduct of the Trial:

Appellants now assert, in passing, that they were "forced on trial upon less than 24 hours' notice" (Juris. Statement, pp. 7, 24). They refer to the denial of appellant Union's application for an adjournment on February 5th. They ignore the proceedings on February 6th, when, with defendants' consent, the return date of the motion to punish DeLury for contempt was advanced from February 7th to February 6th and consolidated with the motion to punish the Union. The trial began without objection (pp. 83-84).

Similarly, the claim that the trial judge was prejudiced (Juris. Statement, p. 24) is not supported by the record. Indeed, the purpose for repeating this baseless charge of prejudice in this Court is not clear, since appellants have not dignified it either here or in the state courts by asserting a separate claim that either order and mandate should be reversed on this ground.

The Sentence:

Appellant DeLury was sentenced to 15 days in jail and fined $250 under Section 751(1) of the Judiciary Law which provides a maximum sentence of 30 days and a maximum fine of $250. Appellant made no application for a stay pending appeal and has served his sentence.

Appellant Union was fined the maximum authorized daily amount of $10,000 for each of the last eight days of the strike (a total of $80,000) and its dues check-off privilege was suspended for the maximum period of eighteen months, all pursuant to Section 751(2) of the Judiciary Law. The punishment of the Union is stayed pending disposition of this appeal.

POINT I

With a single exception, New York tries all categories of criminal contempt cases without a jury. To remedy abuses which arose in criminal contempt proceedings brought in cases arising out of private labor disputes, it provided for jury trials in such cases only. The absence of such a jury trial exception for cases arising out of strikes by governmental employees does not deny equal protection, at least where there have been no similar abuses.

(1)

Appellants did not demand a jury trial and no question with regard to a jury was raised in the court of first instance.

The first reference in this case to jury trials was in appellants' letter to the Appellate Division dated May 27, 1968 in which they contended that *Bloom* v. *Illinois,* 391 U. S. 194 (1968), required reversal of the contempt adjudications despite the absence of a jury demand. After this Court held in *DeStefano* v. *Woods,* 392 U. S. 631 (1968), that *Bloom* v. *Illinois* would not be applied to trials which began prior to May 20, 1968, the Appellate Division affirmed without opinion.

Appellants made the same argument in the New York Court of Appeals and added an argument that they were entitled to a jury under New York's so-called Little Norris-LaGuardia Act. Both arguments were considered and rejected by the Court of Appeals.

In their Jurisdictional Statement appellants now place their entire reliance on an argument which they make for the first time—that they were entitled to a jury trial under the equal protection clause. Appellants do not refer to any point in the record or in the appellate proceedings below at which the equal protection argument was raised, nor do they claim specifically that they raised it below. They do seem to suggest, however (Juris. Statement, p. 11), that the Court of Appeals passed on this argument even though it was not raised.

An examination of the Court of Appeals' opinion, however, reveals that its references to the equal protection doctrine had bearing only on the propriety of the legislative classification which differentiated between strikes by public and private employees by banning the former. The opening sentence of the Court's opinion refers to its earlier opinion in *Rankin* v. *Shanker,* 23 N Y 2d 111 (1968), to dispose of the claims, made in both cases, that the appellants were entitled to a jury trial both under the New York statute and under the doctrine of *Bloom* v. *Illinois.* The second sentence of the Court's opinion refers to a discussion of the equal protection doctrine in *Rankin* v. *Shanker,* not on the issue of jury trial, but on the issue of a right to strike, as is evident from the limited page reference to that case.

All of the discussion of the equal protection clause in the Court's opinion pertains exclusively to appellants'

contention that the Taylor Law's continuance of the ban on strikes by public employees offended the equal protection clause of the state and federal constitutions. When the Court returned to the jury trial question (23 N Y 2d at p. 187), it was only to address itself to the question of the construction of the Little Norris-LaGuardia Act.

Appellants' failure to demand a jury is particularly significant in view of the care which this Court has taken to point out that a jury trial was demanded in *Bloom* v. *Illinois,* 391 U. S. at pp. 195, 197, 198, 210. See, also, *Dyke* v. *Taylor Instrument Co.,* 391 U. S. at p. 217; *Duncan* v. *Louisiana,* 391 U. S. at p. 146. Presumably, the same approach would be followed where the claim was grounded in the equal protection clause and where, as here, the appellants, unlike the petitioner in *Baxstrom* v. *Herold,* 383 U. S. 107 at p. 109n (1966), were represented by counsel.

We now proceed to a discussion of the legal principles involved in the claimed denial of equal protection even though no jury was demanded and even though the equal protection argument, on which appellants now place their sole reliance, was not raised or passed on in the state courts.

(2)

Under the New York Constitution there is no requirement that there be a trial by jury in criminal contempt proceedings. *People ex rel. Frank* v. *McCann,* 253 N.Y. 221 (1930). See *Rutherford* v. *Holmes,* 5 Hun 317, 319 (1875). Section 750, subd. A, par. 3, of the New York Judiciary Law provides that a court of record has power to punish for criminal contempt a person guilty of wilful

disobedience of its lawful mandate. This provision for trial of a criminal contempt by the court has been in the statutory law of New York since 1829. See NELLES, *Summary Power to Punish for Contempt,* 31 Col. Law Rev. 956, 967 (1931); 13TH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL at p. 253. See, as to earlier periods, *United States* v. *Barnett,* 376 U. S. 681, 714-716 (1964).

We are not aware of any case or statute requiring a trial by jury in a criminal contempt proceeding in New York until the enactment of the Little Norris-LaGuardia Act in 1935.* This legislation was adopted shortly after the enactment of the federal Norris-LaGuardia Act** and was patterned on the federal law. Like the federal law it provides for trials by jury in contempt proceedings arising out of failure or refusal to obey any mandate of an injunction granted in any case involving a labor dispute (N.Y. Judiciary Law, §753-a; N.Y. Labor Law, §808). These statutes and their provisions relating to contempt proceedings have been construed as being applicable only to employees in private industry and not to those in public employment. *Rankin* v. *Shanker,* 23 N Y 2d at p. 115. In so ruling, the New York court followed a similar construction of the federal statute in *United States* v. *Mine Workers,* 330 U. S. 258, 298 (1947), and an earlier construction of the New York statute, *Jewish Hospital of Brooklyn* v. *Doe,* 252 App. Div. 581 (1937).†

* New York Laws 1935, chapters 298, 299, 477. Civil Practice Act, §882-a, enacted by chapter 298 is now to be found in New York Labor Law, §808. Civil Practice Act, §867-a, enacted by chapter 477 is now to be found in New York Labor Law, §807.

** 47 U.S. Stat. 70; 29 U.S.C. §§101-115; 18 U.S.C. §3692.

† Other state courts have uniformly followed the *Mine Workers* construction in cases involving the injunctive provisions of statutes

The enactment of the federal and New York legislation had been preceded by a long history of what was regarded by many, including the proponents of the federal bill, as abuses by the courts in the issuance and enforcement of labor injunctions. An outstanding example was the lower court order which found Samuel Gompers, president of the American Federation of Labor, guilty of contempt for violating an injunction and sentenced him to a year of imprisonment. This Court reversed in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911). Another notable example was *In re Debs*, 158 U. S. 564 (1895). Cf. *Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, 101 (1940). See FRANKFURTER & GREENE, *The Labor Injunction* (1930); GREEN, *Legal Aspects of the Labor Movement*, 15 Ore. Law Rev. 13 (1935). These abuses were discussed in the Congressional debates on the Norris-LaGuardia Act. See, e.g., 75 Cong. Rec. 4774, 5478, 5495, 5499-5500.

At the time of the enactment of the labor legislation thus far discussed, there was no history of similar abuses

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patterned on the Norris-LaGuardia Act. *City of Minot* v. *General Drivers & Helpers Union*, 142 N.W. 2d 612 (N.D., 1966); *Del. Riv. & Bay Auth.* v. *Int'l Org. of Masters, Mates & Pilots*, 45 N.J. 138, 211 A. 2d 789 (1965); *Hansen* v. *Commonwealth*, 344 Mass. 214, 181 N.E. 2d 843 (1962); *City of Pawtucket* v. *Pawtucket Teachers Alliance*, 87 R.I. 364, 141 A. 2d 624 (1958), as well as the jury trial provisions in *In re Block*, 50 N.J. 494, 236 A. 2d 589 (1967) (jury trial demanded). *Board of Education* v. *Public School Employees Union*, 233 Minn. 144, 45 N.W. 2d 797 (1951), is only apparently to the contrary since the state statute involved departed from the Norris-LaGuardia format by expressly excepting some but not all public employees from its provisions. All of these cases except *Hansen* and *Block* were appeals from the injunctive order. In *Hansen*, appellants appealed from contempt convictions on the ground that the Little Norris-LaGuardia provisions were not complied with in the issuance of the injunction. The contempt trial appears to have been without a jury, but no issue was raised on this score.

in respect to public employees. No mention of abuses involving public employees is found in FRANKFURTER & GREENE, *supra*. The Congressional debates make no reference to abuses in respect to public employees and show that the federal act was not intended to apply to federal (75 Cong. Rec. 5503) or municipal (75 Cong. Rec. 5499) employees, or to government employees in general (75 Cong. Rec. 5464, 5509). In fact, there had been little or no occasion for the courts to deal with them or their organizations in connection with labor disputes. It was not until 1947 that the threat of strikes by some public employee groups resulted in New York legislation barring strikes by public employees and providing punishment for violation of the prohibition (New York Laws 1947, ch. 391). This legislation, the so-called Condon-Wadlin Law, contained no provision with regard to injunctions, and it did not provide any special treatment of contemnors such as that contained in the Little Norris-LaGuardia Act. This was understandable since there was no background of judicial abuse with respect to public employees such as had preceded the legislation to protect employees and their unions in the private sector some years earlier.

In 1967 the Condon-Wadlin Law was replaced by the Taylor Act (New York Laws 1967, ch. 392). This was a more elaborate attempt to deal with public employee labor relations. It provided methods by which public employees and their unions could present their grievances and bargain collectively. At the same time it continued the prohibition against strikes by public employees.

The Taylor Act made only two changes which affected previous law as to contempt. Civil Service Law §211 man-

dated the chief legal officer of the affected government to apply forthwith for an injunction against an actual or imminent strike, or instigation or encouragement thereof, and to apply forthwith to punish violation of the injunctive order. Judiciary Law §751 was amended by adding a new subdivision (2) which is applicable only to public employee unions. It provided additional financial penalties* and set forth the factors to be considered in mitigation thereof.

As in the Condon-Wadlin Law, no provision was made in the Taylor Act for trial by jury. Nothing in the history of the prior Condon-Wadlin Law had indicated a need for jury trials. Injunctions had been issued against strikes by public employees, but we are unaware of any case where punishment for contempt was drastic or was imposed in the absence of a clear violation.

(3)

Appellants argue, however, that the failure to offer them a trial by jury constitutes a denial of equal protection of the laws. They do not assert that all persons charged with criminal contempt for violating injunctions are entitled to jury trials. It is their contention that violators of injunctions against strikes by public employees are so similar to violators of the more limited injunctions against activities relating to strikes by private employees that to provide jury trials for the latter and not for the former violates the constitutional mandate.

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* From 1829 to date, the maximum penalty which could be imposed under the Judiciary Law and its predecessors upon *individuals* for criminal contempt, regardless of the nature of the contempt or the nature of the perpetrator, has remained at 30 days in jail and a $250 fine.

Legitimate classifications, however, may be drawn among groups which superficially appear to be similar. As was pointed out by Mr. Justice HOLMES in *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144 (1914):

> "A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class."

Legislation aimed at a particular evil may except from its application a sub-class with regard to which the evil is not so pronounced. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955). To the same effect are *Railway Express* v. *New York,* 336 U. S. 106, 110 (1949), *A. F. of L.* v. *American Sash Co.,* 335 U. S. 538, 541-542 (1949), and numerous other cases.

In *Zucht* v. *King,* 260 U. S. 174, 177 (1922), Mr. Justice BRANDEIS wrote for a unanimous court that "in the exercise of the police power classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing." In *McGowan* v. *Maryland,* 366 U. S. 420 (1961), this Court stated (pp. 425-426):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's

> objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

It has been held that it is permissible to abridge the right of trial by jury in the major city of a state without making a similar provision for the counties of the state. *Chappell Chemical & Fertilizer Company* v. *Sulphur Mines Company* (No. 3), 172 U. S. 474 (1899). See *Missouri* v. *Lewis*, 101 U. S. 22, 31 (1879); *Salsburg* v. *Maryland*, 346 U. S. 545, 551 (1954).

Railway Mail Assn. v. *Corsi*, 326 U. S. 88 (1945), upheld the validity of the application to a federal employee organization of a civil rights law provision barring discrimination in admissions to membership in a labor organization. In rejecting an argument that equal protection was denied because another statute, which conferred rights on labor organizations with respect to organization and collective bargaining, excluded from its operations labor organizations whose members are "employees of the State", the Court said (p. 95):

> "A state does not deny equal protection because it regulates the membership of appellant but fails to extend to organizations of government employees provisions relating to collective bargaining. Under customary practices government employees do not bargain collectively with their employer. The state may well have thought that the problems arising in connection with private employer-employee relationship made collective bargaining legislation more urgent and compelling than for government employees. Cf. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 46."

(4)

Before discussing the distinctions between public and private employers which justify the classification here under attack, we note the general rules that the burden of establishing unconstitutionality of a statute rests on the party who assails it and that a "statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell,* 294 U. S. 580, 584 (1935).

The primary factor justifying the distinction in the Norris-LaGuardia Act and in its state counterparts between employees in the private sector and governmental employees is the evil which these laws sought to correct. As appears from the authorities referred to *supra,* pp. 11-12, at the time of enactment the courts were too willing to issue injunctions against labor, too prone to grant excessively broad injunctions and too ready to conclude that these injunctions had been violated. These essentially were the abuses which the enactment was designed to correct. As we have pointed out, no analogous abuses existed then or have arisen since in relation to public employees. Attention has previously been called to the numerous cases which hold that a remedy for an evil need not extend to areas in which it is of lesser proportions. Certainly it need not be extended to an area in which the evil has not been shown or even alleged to exist.

The legislative classification was not based, as appellants suggest, on a difference in the state's regard for the two types of employees or on a determination that one had

a lesser claim to constitutional protection (Juris. Statement, p. 21). On the contrary, the legislature was trying to provide that both types would receive equal treatment under law by removing the inequality resulting from the abuses it found.

The remedial legislation, insofar as it dealt with contempt proceedings, went no further than the narrow category in which the abuses had been found. These abuses had not arisen with respect to public employees or alimony debtors or any of the hundreds of other categories of actual or potential contemnors. There was, therefore, no reason for extending the special provision, which was being provided to remedy an existing evil, to these other categories. It was attempting to eliminate an evil and, in doing so, it limited its remedy to the area in which the evil existed. Nor was it elevating private sector employees and their unions to a preferred status. In essence, it was merely seeking to assure them treatment equal to that of other contemnors.

The suggestion that the legislation deprives the appellants of a jury trial right guaranteed by the federal constitution (Juris. Statement, p. 21) is inconsistent with the fact that appellants have abandoned such claim, asserted by them in the appellate courts below in reliance on this Court's opinion in *Bloom* v. *Illinois,* 391 U. S. 194 (1968).

The appellants' argument comes down to a claim that, if a jury trial is provided in contempt proceedings for one category, it must also be provided for all categories. If

equal protection were as simplistic a doctrine as appellants suggest, it would mean that a jury trial must be made available not only to public employees but to all of the hundreds of categories of possible criminal contemnors.

Appellants' thesis would confront legislatures with endless dilemmas. If all who come within a general category must be treated with mathematical sameness without the possibility of carving out lesser categories, legislation would have to go beyond the evil sought to be remedied. In this case, the legislature would have the choice of extending the jury trial and other provisions of the Little Norris-LaGuardia Act to many persons beyond the remedial purpose of the statute or of abandoning the remedial legislation altogether. Confronted with the requirement for such legislative over-kill, a landmark statute might never have been enacted or sustained—a result hardly beneficial to or even desired by public employees.

Another valid ground justifying the classification is the one referred to by the New York Court of Appeals in *Rankin* v. *Shanker*—the need for quick action "to deter the continuance of paralyzing public strikes by visiting speedy punishment on the offenders" (23 N Y 2d at p. 117). The Taylor Act recognizes the need for speed by directing that contempt proceedings be brought "forthwith." Former Governor Dewey pointed out, in support of the Condon-Wadlin Act that a strike by firemen could result in the overnight destruction of a whole city, one by policemen could endanger the lives and property of millions of people, and one by sanitation men could "produce an epedimic threaten-

ing the lives of other millions of people'' (Memorandum of Governor Dewey, New York Legislative Annual, 1947, pp. 36-37).

The legislature could have reasonably concluded that a jury trial in contempt proceedings arising from a public employee strike would, in most instances, lead to extended delay. There would be great difficulty in obtaining impartial jurors. Most strikes of public employees result in substantial danger or inconvenience to the public generally. In the instant case it would have been extremely difficult, if not impossible, to find a juror in New York City who was not aware of the accumulating garbage by personal observation as well as from newspaper reports and editorials and who was not, at the least, annoyed by it.

In the 1968 teachers' strike in New York City, the issues so divided the community that it would also have been impossible to find a juror who did not have strong views.

As a result, defendants charged with contempt would be likely to request a continuance and a change of venue, with the delays inherent in the time required to hear and consider these applications. A change of venue would create further delay and other problems. Newspaper stories concerning the strike might prejudice juries outside the area in which the strike is occurring. A change of venue would require those officials of the City who were required to testify to remove themselves from the scene of their responsibilities at a time when they would be most needed to cope with problems arising as a result of the strike. Similarly, union officials who were required to testify would be absent at a time when their presence might lead to a termination of the strike by negotiation.

Private sector labor disputes are capable, of course, of being the subject of wide notoriety and inflamed passions, but the instances in which this occurs are comparatively few. Thus, the need for a speedy determination in the contempt proceeding is a reasonable basis for a legislature to distinguish between the two and to decline to extend the provisions of the Little Norris-LaGuardia Act for jury trials to public employees in the absence of a showing of a real need.

(5)

The cases of *Baxstrom* v. *Herold,* 383 U. S. 107 (1966), and *Griffin* v. *Illinois,* 351 U. S. 12 (1956), relied upon by appellants, are not inconsistent with our analysis. They hold that neither imprisonment nor poverty furnish a rational basis for classifying people as not entitled to procedural rights afforded to all others. In *Baxstrom*, the Court, in rejecting a contention that the classification was justified by the proven criminal tendencies of the allegedly insane prisoners, pointed out that the capriciousness of the classification was clearly revealed by the fact that the exception for prisoners was not applicable to persons with a past criminal record who were not in prison at the time of the institution of civil commitment proceedings (383 U. S. at pp. 114-115). The obvious absence of a rational basis for the classifications in *Baxstrom* and *Griffin* has no parallel in the instant case.

POINT II

Appellants' other points are insubstantial and most of them were not raised below.

(1)

Appellants' discussion of Question 2 contains a melange of comments about the weight of the evidence and the conduct of the trial. That these are frivolous is evident from our statement at pp. 4-6, *supra*.

Insofar as appellants raise the equal protection argument as to the alleged failure to apply to public employees another section of the Little Norris-LaGuardia Act, Labor Law §807(6), the authorities cited in Point I, *supra,* are dispositive. In addition, it should be pointed out that:

(1) Appellants did not allude to this section in the court of first instance.

(2) The Court of Appeals did not refer to the point except insofar as it characterized appellants' "other arguments" as "so tenuous as to require no comment." 23 N Y 2d at p. 188.

(3) Even if Labor Law §807(6) were made applicable, there would be no basis in the record for overturning the holding of the Court of Appeals as to the sufficiency of the evidence. It noted that (23 N Y 2d at p. 187):

> "What the proof convincingly demonstrated, the concession of the defendant's counsel rendered indisputable."

(2)

In their Questions 3 and 4, appellants contend that the Taylor Act deprived them, without due process, of life and property and equal protection of the laws by

(a) banning strikes by public employees,

(b) commanding them to work against their will and without just compensation, and

(c) excluding them "from the application of the State Labor Relations Laws and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the government, against their will" (Juris. Statement, p. 48).

These arguments were not made in the court of first instance. If they had been, they would not have excused appellants' contempt. Even if the court of first instance had erred in issuing the two injunctive orders, it is undisputed that the court had jurisdiction of the person and the subject matter and therefore could punish wilful disobedience thereof. *Mt. Sinai Hospital* v. *Davis,* 8 A D 2d 361 (1959); *United States* v. *Mine Workers,* 330 U. S. 258, 293 (1947). This is true even where the order disobeyed is reversed on non-jurisdictional grounds prior to the adjudication for criminal contempt. *Matter of Cost,* 198 Misc 782 (1950), aff'd 277 App. Div. 1049 (1950), aff'd 304 N.Y. 800 (1952).

In any event, the constitutionality of statutes banning public employee strikes is well established. See *City of New York* v. *DeLury,* 23 N Y 2d 175, 181-187, and cases cited therein.

The statement that the Taylor Act commands the performance of work is false. The statute merely prohibits concerted work stoppages and concerted slow-downs (Civil Service Law §§210(1) and 201(10). The contention that the prohibition of such concerted action creates involuntary servitude was rejected in *Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 251 (1949).

(3)

The appeal as to appellants' Question 5 is not within the jurisdiction of this Court because not taken in conformity with 28 U.S.C. §1257(2). The validity of no state statute is drawn in question or even referred to in Question 5. No New York statute bans informational picketing or authorizes the enjoining of informational picketing. Indeed, the injunctive orders below do not enjoin informational picketing but only picketing for specified illegal purposes. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and *N.A.A.C.P.* v. *Button*, 371 U. S. 415 (1963), upon which appellants rely, did involve state statutes, and these cases involved fact situations entirely different from those in the present case. Moreover, this question was not raised in the court of first instance or raised or considered in the state appellate courts.

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed.

March 14, 1969.

Respectfully submitted,

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No. 1029

JOHN J. DE LURY, Individually, and as President, JOHN J. CONROY, Individually and as Treasurer, etc., of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, etc.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Since this Court will determine whether to review the decision appealed from either as a direct appeal or by granting certiorari (28 U.S.C. §2103; *Anonymous Nos. 6 and 7* v. *Baker,* 360 U.S. 287) it would be pointless for us to further extend the arguments set forth in Points 1 and 2 of our Jurisdictional Statement and demonstrate again that the statutes which we are challenging were thoroughly discussed in, and their validity passed upon by, the New York courts.

Nor would it seem necessary to demonstrate the obvious fact that all of the questions which we have presented are

live and significant, affect literally hundreds of thousands of employees of a multitude of state and municipal agencies and will arise again and again until this Court resolves them.

There are, however, a few matters urged by Appellee in regard to Points 3 and 4 of the Jurisdictional Statement to which we feel a reply might be deemed appropriate.

I

Appellee seeks to dismiss appellants' proposed Questions 3 and 4, whether the Taylor Law unconstitutionally deprived them of due process of law and of the equal protection of the laws, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York, against their will, without making any provision for payment of just compensation for such continued unvoluntary labor.

Appellants' motion (p. 22) argues that these questions were not raised at the trial.

But in our Jurisdictional Statement (p. 7), we quoted the Trial Court's summary decision, which sustained the constitutionality of the Taylor Law without allowing any argument or discussion of the questions of law involved. The Court concluded its summary decision as follows: "So don't talk about the constitutionality" (77).*

These questions were raised as Point IV (pp. 36-55) in appellants' brief in the Appellate Division of the New York

* All references are to pages of the printed Record in the New York Court of Appeals, except as otherwise noted.

Supreme Court; and as Point V (pp. 44-58) in appellants' brief in the New York Court of Appeals. A summary of appellants' argument is printed preceding the opinion of the New York Court of Appeals on page A3 of the Appendix to our Jurisdictional Statement.

More than twelve of the fourteen pages in the opinion of the New York Court of Appeals are devoted to a discussion of that Court's opinion that the Taylor Law prohibition of strikes by public employees does not deprive public employees of due process of law, or of the equal protection of the laws.

Since these constitutional questions were thus presented and considered, and since they were actually decided by the New York Court of Appeals in this case, there is no merit to appellee's argument that these questions were not properly or timely raised in the courts below.

II

Appellee argues further (p. 22) that these constitutional arguments, if made in the courts below, would not have excused appellants' contempt in violating the anti-strike injunction, because the court had jurisdiction of the person and the subject matter, and, therefore, it could punish the appellants for violating the injunctions.

But in the New York courts the appellants appealed (3, 5) from the order, dated February 5, 1968, which granted the anti-strike injunction (7, 8), as well as from the orders (11, 17) which adjudged them guilty of violating a prior

ex parte anti-strike injunction order, dated February 2, 1968 (25).

The appeal from the anti-strike injunction order of February 5, 1968, properly presents the question of the constitutionality of the anti-strike provisions of the Taylor Law.

Appellants' alleged disobedience of the anti-strike injunction order of February 5, 1968, did not affect their right to direct appeal from the decision of the Trial Court sustaining the constitutionality of the anti-strike provisions of the Taylor Law. *United States* v. *United Mine Workers*, 220 U.S. 258, 293.

III

Appellee argues further (p. 23) that the Taylor Law does not deprive appellants of due process of law, or of the equal protection of the laws, because it does not cause involuntary servitude by commanding performance of work; and that it "merely prohibits concerted work stoppages."

Appellee thus seeks to distinguish between an affirmative command to perform work, and a negative prohibition of "work stoppages," by arguing that the Taylor Law constitutionally prohibited "*concerted* work stoppages" (emphasis supplied).

But this Court has said that "It is not a violation of the Sherman Act for laborers *in combination* to refuse to work"; and that "the Clayton Act * * * does recognize an absolute right of employees to work or cease working ac-

cording to their own judgments." *Hunt* v. *Crumboch*, 325 U.S. 821, 824, 825 footnote (emphasis supplied).

In *National Protective Association of Steamfitters* v. *Cumming*, 170 N.Y. 315, the Court reviewed the history of statutes enacted in England, beginning with the first Statute of Labourers in 1349, which provided that every able-bodied man and woman "shall be bounden to serve him which shall so require him"; and continuing up to the Act of 1800 which provided for three months' imprisonment of any workman who "enters into any combination to obtain an advance of wages, or lessen or alter the hours of work". The Court said that these statutes "have at last been swept away"; and that they are "hostile not only to the statute law of this country, but to the spirit of our institutions". 170 N.Y. at 332, 333.

The Taylor Law amounts to a twentieth century re-enactment of the English Statute of Labourers of 1349. Its effect is to make every man who works for the government "bounden to serve" the government that employs him.

The argument that the Taylor Law does not command continued performance of involuntary labor, because it ONLY prohibits a "concerted" stoppage of work, is a transparent technicality.

"Concerted" stoppage of work is the only effective means available to workmen to induce an employer to make better terms with them. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209; *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234.

The right to strike is the foundation that enables a worker to participate in fashioning his own economic freedom from dependence upon and subservience to his employer; and it loosens the compulsions exerted on him by his need for money to buy things that he needs or wants for himself and his family.

Today, government is the largest employer of labor, and it is constantly expanding into activities formerly carried on by private industry.

Other countries, particularly England, France, Italy and the Scandinavian countries, have nationalized some or all of their industries, and they have made government employees out of the workers in such industries. Yet, they have not found it necessary to prohibit strikes in such industries; and when such strikes occurred, even a strike by employees of the Bank of France, the governments affected have not asked their courts to enjoin such strikes, and to imprison the strikers for engaging in illegal strikes against the government.

In our country, we have regulated, but not prohibited strikes, because we know from our deepest instincts that when we prohibit strikes, we shackle our own freedom.

Free men work voluntarily for wages, and under conditions to which they agree. But when the government compels them to continue to work for it against their will for wages that the government fixes, then they are no freer than the workers in the Communist and Fascist dictatorships, whom such governments compel to continue to work for government-fixed wages.

The men who wrote our Constitution knew that the government might have need to take the property of citizens without their consent. In the Constitution, they gave that power to the government, but they also imposed on the government the obligation to pay just compensation for such property. The government should do no less, when it takes the labor of a human being without his consent.

In our Jurisdictional Statement (p. 40), we cited *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522, 541, as holding that except in the military service, a statute cannot constitutionally prohibit a strike and command continuation of uninterrupted service by employers and employees; and we cited *Wilson* v. *New,* 243 U.S. 332, 353, as holding that when a statute prohibits a strike and commands continuation of uninterrupted services on the ground that it is necessary in the public interest, then the workers affected have a constitutional right to judicial review of the fixation of their wages, to determine whether they are so inadequate as to amount to a deprivation of property without due process of law.

Appellee's motion has passed these cases by in silence, without showing how the Taylor Law can constitutionally prohibit strikes by public employees, without making some provision for fixing just compensation for the continued involuntary labor which it commands workers to continue to perform for the government, against their will.

Conclusion

Appellee's motion to dismiss the appeal should be denied, and jurisdiction of the appeal should be noted.

March, 1969.

Respectfully submitted,

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MOTION FILED

JUL 5 1969

IN THE

Supreme Court of the United States

October Term, 1968

No. 1029

JOHN J. DELURY, Individually and as President, JOHN J. CONROY, Individually and as Treasurer, etc., of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND CHAUFFEURS, ETC.,

Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

PETITION FOR REHEARING

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Appellants,

vs.

THE CITY OF NEW YORK,

Appellee.

PETITION FOR REHEARING

Appellants petition this Court to grant them special leave to file this petition for rehearing of this cause after expiration of the 25-day period following this Court's order of April 1, 1969, which dismissed their appeal; and, in support of their petition, the appellants respectfully show:

Grounds for Rehearing

On April 1, 1969, this Court dismissed the appeal of the appellants herein "for want of a properly presented federal question".

Since "federal question[s]" are directly involved in the appeal, i.e. due process and equal protection, it would appear that this Court dismissed the appeal upon the ground that they were not "properly presented".

However, the record would seem to lend no support for such a conclusion. For, as appears from the Jurisdictional Statement, questions of due process and equal protection were directly presented and the opinion of the New York Court of Appeals affirming the conviction, review of which is sought here, dealt at length with those constitutional questions and, in addition, incorporated by reference the opinion of that Court in another case (*Rankin* v. *Shanker*, 23 N.Y. 2d 111) which dealt at length with those constitutional questions, and the concurring memorandum of three of the Judges of the New York Court of Appeals in the present case specifically stated that their concurrence was founded "on constraint of this court's decision in *Rankin* v. *Shanker* (23 N.Y. 2d 111) insofar as the right to a jury trial is concerned" (23 N.Y. 2d at p. 188, App. A to Jurisdictional Statement).

A

Appellants' Jurisdictional Statement included the following questions (pp. 3-4):

> "3. Whether Article 14 of the New York Civil Service Law unconstitutionally deprived the appellants of liberty and property without due process of law, by prohibiting them from striking, and by commanding them to continue to work for the Government of the City of New York against their will, without making any provision for payment of just compensation for such continued involuntary labor?
>
> "4. Whether the said statute unconstitutionally denied to the appellants the equal protection of the laws, by excluding them from the application of the State's labor relations laws, and making no equivalent provision for payment of just compensation for the involuntary labor which it commands governmental workers to continue to perform for the Government, against their will?"

The record shows that the appellants raised the above-quoted Federal constitutional questions during the trial, as follows:

> "Mr. O'Dwyer: I have set forth, generally speaking,—by the way, your Honor, when I have not raised the constitutional question here with respect to the Taylor Act it is not because of the fact that I am waiving that, but merely because of the fact that I think in this instance here the people that are before you are not even alleged to be in violation.
>
> "The Court: I will dispose of that constitutional question for you in one minute. The language is the same as it was in the Condon-Wadlin Act and that was

held constitutional all the way up the line. So don't talk about the constitutionality." (76-77)

"Mr. O'Dwyer: It is our contention, from the inception, your Honor, and I have said it before, and I repeat it now at this time, that the Taylor Law never did apply to this situation, number one; and, secondly, that there is no basis in law for this order, and it is unconstitutional and contrary to the State and National Constitution." (111)

"Mr. O'Dwyer: I now deal with the motion insofar as DeLury is concerned, and I now, again, renew the motions made previously, upon all the grounds heretofore set forth; and on the further ground that the order issued herein was not by virtue of law, and that any law with regard to it is contrary to the provisions of the State and National Constitutions." (112)

"Mr. O'Dwyer: Your Honor, may I just make one more observation? I would like to preserve the record by incorporating here the objection to the statute as being unconstitutional as far as the State and National Constitution is concerned." (129)

The New York Court of Appeals considered and decided in this case that the Taylor Law prohibition of strikes by public employees does not deprive the appellants of due process of law (23 N.Y. 2d 175, 182-186; Appendix A, p. 2a), or of the equal protection of the laws (*id.*, pp. 187-188; Appendix A, p. 2a).

The New York Court of Appeals made an order in this case on December 11, 1968, that (Appendix A, p. 9a):

"the opinion of the Court clearly indicates that the constitutional arguments raised by the appellants were passed upon."

I

Where, as here, the record shows that the constitutional validity of a State statute was questioned, but that the particular grounds were not stated in the record, and the opinion of the highest State Court discussed certain grounds for questioning the constitutional validity of the statute and sustained its constitutional validity, this Court has jurisdiction to hear and to decide the question of the validity of such State statute which was considered in the opinion of the highest State Court. *Silver* v. *Silver,* 280 U.S. 117, 122; *Saltonstall* v. *Saltonstall,* 276 U.S. 260, 268. In the *Silver* case, *supra,* this Court said (280 U.S. at 122):

> "As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the Court below."

In this case, the record shows that the Trial Court prevented the appellants from stating the grounds for their questioning the constitutional validity of the statute, by deciding summarily, without allowing any argument, that the statute was constitutional, and by concluding its summary decision with the words, "So don't talk about the constitutionality" (77).

Appellee moved to dismiss the appeal herein:

> "On the ground that some of the questions presented were not raised in the courts below, and all of them are so unsubstantial as not to need further argument."

Appellee did not contend that all the questions presented had not been raised in the courts below, but only that the question as to whether appellants had a right to a jury trial in this prosecution for criminal contempt for non-compliance with an anti-strike injunction issued under the Taylor Law, and whether the appellants were denied procedural due process and equal protection of the laws during their trial for criminal contempt for non-compliance with such injunction were not so raised.

While appellee's motion also contended that "in the court of first instance" the appellants did not make the specific arguments that they made in their appellate briefs in the New York Courts questioning the constitutionality of the Taylor Law, this is immaterial because the New York Court of Appeals actually considered such arguments and wrote an opinion concluding that the Taylor Law did not deprive the appellants of due process of law or of the equal protection of the laws, and thereby those constitutional questions became available for review by this Court on this appeal. *Whitfield* v. *Ohio,* 297 U.S. 431, 435, 436.

B

The opinion of the New York Court of Appeals in this case also considered and decided that since appellants are employees of a municipality they have no right to a jury trial in this prosecution for criminal contempt for non-compliance with an anti-strike injunction order, issued under the Taylor Law (23 N.Y. 2d 175, 188; Appendix A. See, also: *Rankin* v. *Shanker,* 23 N.Y. 2d 111; Appendix B) even though every other class of employees has such a right by virtue of a New York statute. This, it would

seem, is a plain denial of equal protection under the decided cases discussed in the Jurisdictional Statement.

In these circumstances, this Court has jurisdiction to hear and to decide this constitutional question, even though it was not raised at the trial and was first raised on appeal to the Appellate Division of the New York Supreme Court, particularly since that question was obviously considered and rejected by the New York Court of Appeals.

In *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 185-186, the Court said:

> "Where it appears from the opinion of the State court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

C

The dismissal of the appeal herein "for want of a properly presented federal question", has left undecided important constitutional questions concerning the relations between State and local governments and their employees. Such questions need to be decided now.

We have not found any reported case in which this Court considered and decided the merits of appellants' contentions that the Taylor Law prohibition against strikes by public employees deprives such employees of due process

of law and of the equal protection of the laws and that a State, while according the right to trial by jury in labor-injunction cases generally, can deny that right solely to municipal employees whose duties are indistinguishable from those performed by private employees.

The dismissal of appellants' appeal by this Court has left undecided serious constitutional questions which are bound to arise again and again in the New York courts and in State courts throughout the land. The order of this Court has created widespread uncertainty among the vast multitude of civil servants. The oldest publication devoted to the interests of state and municipal employees expressed these circumstances in an editorial to which we respectfully call this Court's attention:

> "The U. S. Supreme Court's dismissal of a suit contesting the constitutionality of key provisions of the Taylor Law sheds little light on the subject.
>
> "In an unsigned opinion, the Court said simply that 'the appeal is dismissed for want of properly-presented Federal question,' whatever that means. Does it mean there is no Federal question involved, or does it mean there is a Federal question, which if properly presented, would be entertained by the court?
>
> "Although the chances may appear remote, a request by Mr. DeLury for reargument before the Supreme Court seems appropriate. As matters now stand, employees and their unions are uncertain as to the court's opinion on this vital question." (The Chief, April 16, 1969)

Conclusion

For the foregoing reasons it is respectfully urged that special leave be granted to the appellants to file this petition for rehearing of this cause after expiration of the 25-day period for filing thereof; that the petition for a rehearing be granted; and that, upon further consideration, the judgment of the Court of Appeals of the State of New York be reversed.

July, 1969.

Respectfully submitted,

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Certificate of Counsel

I, PAUL O'DWYER, counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ PAUL O'DWYER

PAUL O'DWYER
Counsel for Appellants

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DeLURY ET AL. *v.* CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1029. Decided April 1, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a properly presented federal question.